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Chairman: Mr. Enkhsaikhan (Mongolia)

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The meeting was called to order at 10.15 a.m.

Agenda item 153: Establishment of an International Criminal Court (*continued*) (A/53/189 and 387)

1. **Mr. Türk** (Slovenia) said that the successful completion of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court was a historic step towards making the rule of law and the protection of human rights truly universal. The adoption of the Statute of the International Criminal Court meant that substantive norms and institutional enforcement would now be part of an objective, coherent, non-political and genuinely international system.

2. Many of the participants in the Rome Conference had had specific expectations with regard to the Statute, which, as a text embodying the widest possible agreement, could not meet them all. His Government's expectations had been disappointed with regard to two issues in particular. First, it was regrettable that the "Korean proposal" for article 12 had not been included in the final package. The current preconditions limited the Court's ability to exercise its jurisdiction, as it was to be expected that, frequently, neither the territorial State nor the State of nationality of the accused would be a party to the Statute. Secondly, his delegation regretted that it had not been possible to include attacks on United Nations-declared safe areas in the list of war crimes in article 8. In a spirit of compromise, Slovenia had withdrawn its proposal at the Conference, on the understanding that such attacks were largely covered by the crime of intentionally directing attacks against the civilian population.

3. Those objections notwithstanding, his Government was convinced that the Rome Statute represented a sound basis for the functioning of the future Court, which could make a real and lasting difference. His delegation was confident that it would be possible to build upon the Statute in the future on the basis of the actual working experience of the Court. In that context, Slovenia welcomed the inclusion within the Court's jurisdiction of crimes committed during both international and domestic armed conflicts. It was to be hoped that article 124 would rarely be applied by States, and that it would be of a transitional nature, not a permanent opt-out provision.

4. With regard to the technical error that had crept into article 121, paragraph 5, of the 17 July 1998 version of the Statute, it was his delegation's understanding that it had been due to the extremely short period of time available for the preparation of the final text. The error could not, therefore,

be viewed in any way as grounds for reopening the Statute. The correction should be made in accordance with the provisions of article 79 of the Vienna Convention on the Law of Treaties of 1969.

5. His delegation was well aware that work on the establishment of the Court remained to be completed. Priority must be given to finalizing the draft texts of the Rules of Procedure and Evidence and of the Elements of Crimes before 30 June 2000. His Government strongly supported the early convening of the Preparatory Commission for a duration of at least eight weeks during 1999, and was prepared to do its utmost to contribute to the accomplishment of the tasks entrusted to the Commission.

6. His delegation welcomed the inclusion of the crime of aggression within the Court's jurisdiction and hoped that through further negotiations it would be possible to arrive at an acceptable and realistic definition of that crime.

7. Slovenia looked forward to the speedy entry into force of the Statute, which would enable the coming into operation of the Court without delay. The high number of signatories to the Statute recorded so far was encouraging. It was to be hoped that many more countries would sign at the earliest possible date and initiate the domestic formalities required for ratification. In that connection, his Government had signed the Statute on 7 October in Rome.

8. **Mr. Skotnikov** (Russian Federation) said that his delegation had consistently supported the establishment of an efficient and permanent international criminal-justice organ that could complement the existing system for the maintenance of international peace and security. On the whole, the Rome Conference had met that challenge successfully. The Statute of the International Criminal Court was a well-balanced compromise that would enable the Court to make a sizeable contribution to the fulfilment of the purposes and principles of the Charter of the United Nations.

9. First, the Court was clearly integrated into the existing system for the maintenance of international peace and security through the key role played by the Security Council. The Council could trigger the exercise of the Court's jurisdiction or suspend it if the fulfilment of its mandate under the Charter so required. The relationship of the Council to the Court, as stipulated by the Statute, was based not on subordination, but on cooperation in the best interests of the international community. The Court's independence would not be affected by the support of the Security Council, while its efficiency would be enhanced.

10. Second, the Court was intended not to substitute for national judicial authorities, but to complement them in

cases where they became ineffective or ceased to exist. Thus, the principle of complementarity, as set forth in the Statute, was of the utmost importance. The Court was, first and foremost, the guarantor of the proper administration of justice by national judicial organs with respect to the most serious international crimes. At the same time, it served as a warning to potential criminals.

11. Third, the Statute set forth democratic principles of criminal justice ensuring due process for the accused. It spelt out the responsibilities and powers of the Prosecutor with regard to the institution of proceedings and the role and functions of the Pre-Trial Chamber. Together with the admissibility criteria specified in the Statute, those provisions constituted stable guarantees against attempts to manipulate the Court for political purposes.

12. Fourth, the Statute contained clear definitions of the crimes within the jurisdiction of the Court. Those definitions established high thresholds which would prevent isolated instances of crimes from being referred to the Court. It was clear that the Court should exercise jurisdiction in relation to large-scale, systematic crimes perpetrated in fulfilment of the policy of a State or an organization.

13. As to the definition of the crime of aggression, his delegation assumed that it would be linked directly to the exclusive prerogative of the Security Council to characterize the actions of a State as an act of aggression as a prerequisite for the institution of proceedings against an individual.

14. Fifth, the Statute contained adequate guarantees of the protection of information affecting the national security interests of a State when such information was requested by the Court.

15. Sixth, the procedures governing the composition of the court and its administration made it possible to assume that the Court would function efficiently and impartially.

16. Seventh, the Court would be financed by States parties to the Statute. It would be financed from the United Nations regular budget only in cases where the Security Council referred cases to the Court. Such a financing arrangement was a guarantee of the Court's independence.

17. Eighth, the Statute provided for the establishment of an Assembly of States Parties, which was also an important prerequisite for ensuring that the Court was integrated into the efforts to maintain international peace and security.

18. While those and other provisions of the Statute had made his delegation's support possible, it was regrettable that several reasonable proposals had not been included in the Statute, and that such an extraordinarily important document had had to be adopted by means of a vote. In

drafting the auxiliary documents, the Preparatory Commission should strive not only to preserve the balance of interests achieved at the Conference, but also to address the concerns of those States which had not supported the adoption of the Statute. In his delegation's view, it was essential to achieve universal recognition of the future Court. His delegation would participate actively in the work of the Preparatory Commission.

19. **Ms. Taddei** (San Marino) said that the establishment of the International Criminal Court embodied a fundamental principle of law, which was that the judge should be appointed before the perpetration of a crime. The ad hoc criminal tribunals had all been established only after the crimes over which they had jurisdiction had been committed, and therefore, they could not exercise a preventive function. While the adoption of the Statute had required compromises on the part of some countries, it represented the first step towards the creation of an effective and credible court that could combat impunity with respect to the most heinous crimes. Her delegation welcomed the establishment of a Preparatory Commission with the mandate to take all the measures required to enable the Court to begin functioning promptly and effectively.

20. The necessary means to achieve that goal was the entry into force of the Statute. Her country had been among the first signatories to the Statute and its legal experts were studying the text with a view to its ratification. So far, 58 States had signed the Statute. Her delegation called upon States that had not yet done so to consider signing and ratifying the Statute and to make reasonable efforts to overcome any obstacles, whether of a technical, political or other nature, which currently prevented them from signing and ratifying it.

21. Her delegation drew attention to resolution E of the Rome Conference, which recognized that terrorist acts and drug trafficking were serious crimes of concern to the international community, sometimes destabilizing the political and social and economic order in States. At the Conference, States had not been able to agree on a generally acceptable definition of those crimes. Nevertheless, the Statute provided for a Review Conference, which allowed for an expansion of the jurisdiction of the Court. Her delegation associated itself with the recommendation of the Conference that a Review Conference should be established to consider those crimes.

22. **Mr. Görög** (Hungary) said that his delegation fully subscribed to the statement made on the item by the representative of Austria on behalf of the European Union.

23. History demonstrated clearly that there could be no peace without justice. His Government was therefore of the view that all those who committed war crimes and crimes against humanity must be held personally responsible and accountable. As a country belonging to a region in which grave violations of international humanitarian law had been committed in recent years, Hungary had welcomed the decision of the Security Council, acting under Chapter VII of the Charter of the United Nations, to set up ad hoc tribunals for the prosecution of crimes committed in the territory of the former Yugoslavia and in Rwanda. The International Criminal Court would have several advantages over the ad hoc tribunals: it would guarantee equal treatment for all violations, by whomever and wherever perpetrated; it would exercise its jurisdiction without undue delay; it would make use of the special expertise of its permanent staff; and it would eliminate the need for a decision of the Security Council in order to establish an ad hoc tribunal.

24. His delegation wished to draw attention to those elements of the Statute of the Court to which it attached the greatest importance: (a) the Court had inherent jurisdiction over the core crimes of genocide, war crimes and crimes against humanity, whether committed in peacetime or during an armed conflict; (b) the Prosecutor was empowered to initiate investigations *proprio motu* in connection with crimes under the jurisdiction of the Court, subject only to review by the Court itself; (c) official capacity, such as being a head of State or Government, would not exempt perpetrators from criminal responsibility and did not constitute grounds for reduction of sentence; (d) the Statute excluded statutory limitations for the crimes under its jurisdiction, thus reconfirming a principle laid down in General Assembly resolutions since the 1960s and universally upheld by national legislation; (e) States parties were under an obligation to comply with requests from the Court for assistance and cooperation; and (f) reservations were not permitted, since they could easily defeat the purpose of the Statute.

25. His delegation, which had been a member of the "like-minded" group and had voted in favour of the Statute at the Conference, hoped that the 60 ratifications needed for its entry into force would be reached as soon as possible. His Government had taken the necessary steps to sign and ratify the Statute in the near future.

26. Hungary continued to cooperate actively with other members of the Preparatory Commission, whose major task was to finalize the draft texts of the Rules of Procedure and Evidence and of the Elements of Crimes, as well as the documents necessary for the functioning of the Court. It was important that all States which had signed the Final Act in

Rome, and those which had been invited to participate, should take part in the work of the Preparatory Commission. It was to be hoped that the opportunity would arise in the course of that work to accommodate some of the concerns raised by a number of States during the Conference, thus facilitating the emergence of an even broader consensus. Only the expeditious accomplishment of the tasks of the Preparatory Commission would enable the Court to begin functioning in the foreseeable future. For that reason, the Preparatory Commission should be provided with all the resources and services required for the efficient performance of its duties.

27. **Mr. Chandumajra** (India) said that his delegation had participated actively in the process leading to the establishment of the International Criminal Court. India had hoped for the creation of a universally acceptable, independent and efficient institution that could deal not only with traditional crimes, such as war crimes and genocide, but also with international terrorism and drug trafficking. Regrettably, those hopes had been disappointed on several accounts.

28. In the first place, the Statute had failed to include international terrorism in the crimes covered; failed to provide flexibility in the nature of the Court's jurisdiction; blurred the distinction between customary law and treaty obligations in the definitions of internal conflicts and crimes against humanity; and failed to respect the principle of consent of States, the principle of territoriality in the exercise of criminal jurisdiction and the priority of national criminal jurisdiction over international jurisdiction. What was worse, the Statute had legitimized the over-stretched interpretation of the powers of the Security Council by subordinating the future Court to the discretion of the five permanent members of the Council. It was ironic that the Statute treated offences such as murder as an international crime, but failed to include the first use of nuclear weapons, which would result in the annihilation of a major part of humanity. It was uncertain, therefore, whether an international criminal court founded on such a statute had any prospects of becoming universal.

29. In accordance with resolution F adopted by the Rome Conference, the Preparatory Commission for the International Criminal Court was to prepare proposals on various administrative and financial matters. It was also to prepare, by 30 June 2000, the draft texts of the Rules of Procedure and Evidence and of the Elements of Crime. Furthermore, the Preparatory Commission was to prepare proposals for submission to the Review Conference on the definition and Elements of Crimes of aggression and the

conditions under which the Court could exercise its jurisdiction with regard to that crime.

30. International terrorism was the most reprehensible type of international crime, threatening the political integrity and the social fabric of States and taking the lives of innocent civilians. The Preparatory Commission should, as a priority, prepare proposals for a provision on terrorism, including the definition and Elements of Crimes of terrorism. The Commission should submit those proposals to the Review Conference with a view to arriving at an acceptable provision for inclusion in the Statute.

31. Lastly, it was to be hoped that the Preparatory Commission would take into account the views of all States and that requests from States which represented the majority of the world's population would not be brushed aside because they were not politically convenient to those described as the "like-minded".

32. **Mr. Calovski** (The Former Yugoslav Republic of Macedonia) said that his Government had signed the Final Act of the Rome Conference. It had also signed the Statute and would ratify it in due course.

33. The successful conclusion of the Rome Conference represented a major development in the promotion of international law. Several times in the twentieth century, the Macedonian nation had been the victim of genocide, war crimes and crimes against humanity; it was therefore natural that his Government had consistently supported the establishment of an international criminal court.

34. The task of implementing resolution F of the Rome Conference lay ahead. It was to be hoped that the Preparatory Commission would accomplish its tasks in a timely manner. The most important task, however, was the promotion of the Statute, so that the Court could begin functioning at the beginning of the next century.

35. His delegation believed that it was very important not to change the Statute of the Court as adopted. While the view that the Statute should not have neglected to mention landmines and weapons of mass destruction, particularly nuclear weapons, drug trafficking, and so on, was credible, it was a source of satisfaction that the Court's jurisdiction covered such crimes as denial of humanitarian assistance, forced displacement, attacks on humanitarian personnel, and so on. It was true that the Statute was not a perfect document; nonetheless, it was regrettable that some major countries had not been able to join the consensus in Rome. His delegation hoped that they would be able to do so at a later stage.

36. Future activities to promote the Statute should clarify the following aspects: (a) the relationship between the United Nations and the Court; (b) the relationship of non-party States to the Court, and the principles of universality in the existing instrument; and (c) crimes falling under the Statute.

37. In September he attended the twenty-third Round Table on Current Problems in International Humanitarian Law in San Remo, Italy. The meeting had been devoted to an analysis of the Rome Statute of the International Criminal Court, and had concluded that the Statute, although not perfect, was the best that could be expected under the prevailing international circumstances. The conclusions of the round table would surely be of interest to Committee members, and he would be happy to give them to the Secretariat for distribution as an informal document.

38. In conclusion, he said he wished to stress the importance of the preventive effect that the Court would have, and to urge States to sign and ratify the Statute at an early date.

39. **Ms. Simone** (Armenia) said that her delegation welcomed the adoption of the Statute of the International Criminal Court. Producing a final document had been no small feat. Inclusion of the crime of aggression with no definition was one of the compromises that had had to be made. While her country had supported including aggression, it had done so with the understanding that a clear definition would be drafted. It was problematic to have included the crime without any definition, even with the proviso that the Court would only be able to exercise jurisdiction after a definition was approved by the Assembly of States Parties.

40. Her country had also supported the inclusion of the crime of terrorism, but had felt that it would be appropriate to leave that crime for consideration at a later review conference, rather than include it in the Statute without a clear definition acceptable to a majority of delegations. That might also have been the better approach for the crime of aggression.

41. Armenia was satisfied with the final compromise reached on the provision governing the Prosecutor. The checks and balances built into the system should meet the concerns of all Member States, while preserving the independence of the Prosecutor. Her Government would have preferred to see a more restrictive time limit on the Security Council's deferral right, but could accept the compromise made.

42. Her delegation regretted that the substantial compromises made with respect to the jurisdiction of the Court were still not acceptable to a small number of States. The issue should be reopened for further negotiation, in an effort to further narrow the jurisdiction provision.

43. Despite the compromises made, a viable statute had been negotiated. In order for the Court to accomplish its intended purpose, several steps still needed to be taken. A number of provisions would need to be drafted by the Preparatory Commission, including the Rules of Procedure and Evidence, the Elements of Crimes, a relationship agreement between the Court and the United Nations, and a number of other practical arrangements for the functioning of the Court. Sufficient time and resources would have to be allocated to the Preparatory Commission to allow it to accomplish its mandated goals.

44. The Statute would need to be ratified by 60 States before it came into force. Many parliaments would have to be convinced that ratifying it would not infringe on national sovereignty. Under the principle of complementarity, national courts could be assured that the Court would only intervene if and when States were unwilling or unable to prosecute and punish those responsible for crimes under the Statute.

45. Seen in its proper context, the adoption of the Statute was a remarkable achievement in the advancement of human rights. It would fill the current void in international law and eliminate the need for independent ad hoc tribunals.

46. **Mr. Machochoko** (Lesotho) said that his delegation fully associated itself with the statement made by the representative of South Africa on behalf of the Southern African Development Community.

47. Stressing the historic significance of the adoption of the Rome Statute, he said that the positive aspects of the Statute far outweighed its negative elements. Notable compromises included those reached with regard to crimes covered by the Court, the principle of complementarity, the court's jurisdiction, the independence of the Prosecutor and the prohibition of reservations.

48. By defining criminal conduct that violated certain basic norms established by the international community, the Statute had paved the way for prosecuting those who committed the most serious crimes of international concern. His delegation urged States to sign and ratify the Statute in order to ensure that the Court would begin its operations as soon as possible. His delegation welcomed all initiatives to encourage an accelerated ratification process, and hailed all efforts to promote awareness of the results of the Rome

Conference and of the content of the Rome Statute. It also commended the non-governmental organizations that had tirelessly fought for a fair, independent and effective court.

49. The Preparatory Commission envisaged in the Final Act of the Rome Conference (A/CONF.183/10) should be set up as soon as possible and should be provided with the resources and services required to enable it to perform its functions efficiently and expeditiously. A maximum of eight weeks should be allocated for the Commission to finalize its work.

50. If the Court was to be truly universal, it was essential that all voices should continue to be heard. The trust fund created during the process leading up to and including the Rome Conference had gone a long way towards ensuring the participation of least developed countries in the preparatory work and at the Conference. His delegation supported the call for the continuation of the fund and urged States to make voluntary contributions to it. Non-governmental organizations should also participate in the Commission's work on the terms that had already enhanced their cooperative partnership with the United Nations.

51. **Mr. Norström** (Sweden) said that his delegation fully supported the statement made earlier by Austria on behalf of the European Union.

52. The adoption of the Statute was an outstanding achievement. Like every negotiated product, it represented a compromise, but his country wholeheartedly supported it since it represented the best package that could possibly be obtained under the circumstances. His delegation hoped that those who might have had misgivings would come to the same conclusion.

53. It was important to look forward now: there was work to be done on two fronts. First of all, every effort must be made to ensure the earliest possible entry into force of the Statute. Sweden had already signed the Statute, and his Government had begun preparing a bill for submission to Parliament concerning ratification and the enactment of the necessary legislation with a view to acceding to the Statute by the end of the year 2000. Secondly, it was essential to push forward with the process of negotiating the necessary secondary instruments, including the Rules of Procedure and Evidence, so that the timetable set by the Rome Conference could be adhered to and the draft instruments would be ready for adoption by the Assembly of States Parties as soon as the Statute entered into force. His delegation urged the Sixth Committee to adopt a resolution mandating the establishment of the Preparatory Commission envisaged in the Final Act of the Rome Conference, and giving the Commission the

necessary meeting time and resources in 1999 and, if necessary, in the first half of 2000.

54. His delegation attached great importance to participation in the continuing negotiations by all those who had been invited to participate in the Rome Conference.

55. **Mr. Kirsch** (Canada) said that his country strongly supported the framework for the International Criminal Court which had emerged in Rome, since it would enable the Court to carry out its crucial mandate. Undoubtedly, the Statute was an outstanding example of what the international community could achieve when the necessary political will existed. All delegations, large and small, had made significant contributions to the elaboration of the Statute, including those which ultimately had not been able to join the majority in approving the text.

56. Two of the complex issues that had been dealt with merited particular mention: jurisdiction and complementarity. The solution found in the case of jurisdiction, based on the territorial State or the State of nationality of the accused, was completely in keeping with international law and practice. In particular, it followed not only the approach adopted in many national criminal jurisdictions, but also the approach taken in other international legal instruments, such as a number of conventions aimed at preventing and punishing terrorist acts and various treaties in other areas. In the past few years, several instruments employing that approach had been adopted by the General Assembly.

57. The codification of the principle of complementarity was also one of the Statute's fundamental strengths. The Rome Statute represented a delicate balance, weighted heavily towards the right and responsibility of States to investigate and prosecute, but allowing the Court to assume jurisdiction in special cases to ensure that justice was served. The checks and balances that had been included would permit the Court to exercise jurisdiction only in well-defined circumstances.

58. His country was aware that a few States remained hesitant about the Court. It was to be hoped that their concerns would be allayed once the Court began its operations. Legitimate concerns should be addressed, in order to ensure that the institution to be created would be both credible and responsible. In striving for solutions, it was also important not to undermine the integrity of the Court or dilute its effectiveness. The Court was not a threat to any State that was committed to the well-being of individuals; rather, it would serve the objectives of such States by contributing to long-term international stability.

59. Much work remained to be done, including the drafting of the Rules of Procedure and Evidence, the Elements of Crimes, the definition and elements of the crime of aggression and instruments to facilitate the establishment of the Court in The Hague. To achieve those objectives, the General Assembly should adopt a resolution establishing a Preparatory Commission with a clear and unequivocal mandate and adequate support to enable it to complete its tasks. The resolution should be framed in a manner that would allow for the discussion of any issues that were of concern to States, so as to build universal support for the Court.

60. In conclusion, he informed the Committee that Canada was taking the necessary steps to sign the Statute in the near future.

61. **Ms. Betancourt** (Venezuela) said that the establishment of the International Criminal Court demonstrated the willingness of the international community to ensure that the most serious crimes of international concern would be investigated and that the perpetrators of such crimes would be punished.

62. Her country had played an active role in the work leading up to the Rome Conference, and had supported the establishment of an independent, efficient and complementary Court. The Statute was not perfect, but it did reflect the diversity of positions expressed and the contributions made by the participating delegations.

63. Much remained to be done, as the Preparatory Commission would need to draw up the Rules of Procedure and Evidence, the Elements of Crimes, the financial regulations and rules for the Assembly of States Parties. The support of the international community was of fundamental importance and could only be made effective by the signing and ratification of the Statute and the prompt convening of the Preparatory Commission.

64. Her country had signed the Statute in Rome on 14 October 1998 and was looking forward to participating in the work of the Preparatory Commission. It understood but did not share the concerns expressed by some delegations regarding the future work of the Court.

65. **Mr. Galuška** (Czech Republic) said that, given the impossibility of reflecting the specific expectations of each country, the Rome Statute was a compromise between the different positions expressed. Nevertheless, it was a balanced document that served as a good foundation for a strong, independent and effective Court.

66. His delegation welcomed the provision for the inherent jurisdiction of the Court over crimes under international law;

the provision for its jurisdiction over the crime of aggression was an important achievement, even though the crime was yet to be defined, since to exclude it would cast doubt on the existing principles of customary international law. The principle whereby a State party to the Statute automatically accepted the jurisdiction of the Court was a wise solution to the difficult issue of the trigger mechanism. Unfortunately, however, that principle was weakened by the transitional provision that enabled a ratifying State to refuse, for a period of seven years, the jurisdiction of the Court over war crimes committed by its nationals or in its territory. Conversely, his delegation welcomed the power accorded to the Prosecutor to act *proprio motu* as an important factor in building a responsive and flexible Court.

67. The Preparatory Commission must be established as soon as possible. His country had taken the necessary steps for the signature of the Statute by analysing its potential impact on domestic legislation. The Czech Republic had thus ensured that it was in a position to honour its obligations under the Statute and make any essential adjustments.

68. **Mr. Paulauskas** (Lithuania) said that his delegation aligned itself with the statement made by the representative of Austria on behalf of the European Union. His country took great pride in the knowledge that the international community had provided for the establishment of an institution that would improve international relations on the basis of an effective method of ensuring international justice, supplement the national judicial systems already in place and serve as a catalyst for their continued change and development.

69. Welcoming the inclusion of the crime of aggression in the Statute, he commended the German delegation for its instrumental role in the negotiations on the subject. He said that Lithuania believed that the existing disagreement over a definition of that crime would be overcome through the substantial political and legal input of delegations to the work of the Preparatory Commission. It fully agreed with the European Union that the Preparatory Commission should have sufficient resources to enable it to perform its assigned tasks.

70. Lithuania would sign the Statute before the end of the current year and urged those States which had not yet signed and ratified it to do so.

71. **Mr. Kanju** (Pakistan) said that his country fully supported the establishment of a strong and effective international criminal court. Nonetheless, it had concerns about some provisions of the Statute. For instance, it believed that the Court should exercise its jurisdiction to bring perpetrators of heinous crimes to justice in cases

where, owing to a complete breakdown of authority, a State lacked an effective legal mechanism to enable it to perform its duty in that regard. That principle of complementarity constituted the basic edifice for the Court's exercise of jurisdiction; the Court should complement, and not supplant, the national legal system, failing which it would impinge on the sovereignty of the State. However, some provisions of the Statute, such as the provision concerning the *proprio motu* role of the Prosecutor, tended to dilute that same principle. Similarly, the role assigned to the Security Council in activating the trigger mechanism should be the exclusive realm of States parties, as Security Council decisions were based on political considerations and not on legal principles. His country therefore opposed any Security Council role in relation to the Court, as it would not be conducive to the development of a non-discriminatory and non-selective uniform system.

72. The provisions in the Statute that tended to challenge a State's legal process were also incompatible with the principle of complementarity in that they negated the principle of the sovereignty and integrity of States. Furthermore, armed conflicts not of an international character fell entirely within the domestic jurisdiction of the State concerned, in which case the Statute's provisions in that connection violated both the principle of the sovereignty of States and the principle of complementarity. His country would have equally serious difficulties concerning application of the provision on provisional arrest, which was not an option under Pakistan law. Lastly, Pakistan believed that it was essential to permit reservations to the Statute with a view to ensuring that States were not initially deterred from becoming parties to it and that States which were already parties did not later withdraw. However, it had voted in favour of adoption of the Rome Statute since it was confident that the Preparatory Commission would make every effort to alleviate the serious concerns which it articulated. Clear and unambiguous rules on Court practice might help States to secure their positions on critical issues and encourage them to become parties to the Statute.

73. **Mr. Baker** (Israel) said that the concept of an international criminal court had particular significance for his country and the Jewish people in view of their history. Israel had therefore been involved in the activities relating to the establishment of such a court ever since the early 1950s. Throughout that process, however, it had repeatedly voiced concern over several drafting developments which it regarded as potentially prejudicial to the impartial nature and character of such a court. For instance, some of the war crimes listed in the Statute had been selectively formulated and either lacked substantive elements of the instruments of

international humanitarian law from which they originated or contained elements which had not originally been part of those instruments. Furthermore, various formulations had been deliberately drafted to meet the agenda of certain States, which defeated the principle on which the instrument was based and created potential obstacles to its universal espousal.

74. His country had been consistently hesitant over the extremely wide *proprio motu* capacities granted to the Prosecutor, which could be abused and thus hinder the Court's functioning, and it had also expressed concern over a State's right to withhold from the Court information or documents that could prejudice its national security interests. It was equally concerned by the system for selecting judges on the Court on the basis, *inter alia*, of the principle of equitable geographical representation, which, given the current United Nations regional grouping system, provided little hope for the election of any Israeli candidate.

75. Israel, which had signed the Final Act of the Conference, would participate in the forthcoming deliberations of the Preparatory Commission. It trusted that those deliberations would remedy the hasty drafting process, providing depth and perspective and ensuring acceptability, and pay due regard to the views of all States, including those which had not voted in favour of the Statute.

76. **Ms. Wensley** (Australia) said that her delegation fully associated itself with the statement made at the 9th meeting of the Sixth Committee by the Samoan representative on behalf of the members of the South Pacific Forum that were represented at the United Nations, including Australia. It wished, nonetheless, to make a separate statement on the item under consideration.

77. The adoption of the Rome Statute represented a significant and substantive step towards the realization of a long-standing goal that had hitherto been unattainable, namely that of setting up a court to deter potential perpetrators of the most heinous crimes against humanity by ensuring that they could not act with impunity. It was now crucial to sustain the momentum thus established and embark upon the next phase of work with the same spirit of cooperation and energy which had produced the successful outcome in Rome.

78. It should be recognized that the Statute represented a balanced document which took account of the broad range of positions and concerns to be accommodated without departing from the original principles that had motivated the international community into pursuing the establishment of the Court. The Statute also did justice to the guiding principles of an independent, balanced and fair court that

warranted wide international support. The means through which the Statute endeavoured to reflected a balance in the role of the Court were evident in its strong complementarity provisions, the provision of a strong role for the Security Council and the provision of a *proprio motu* role for the Prosecutor, coupled with the appropriate safeguards.

79. It was now essential to move expeditiously to the next phase of addressing the practical arrangements for the establishment and coming into operation of the Court. Given the crucial role of the Preparatory Commission in that process, it was vital to ensure that it had adequate meeting time and resources to fulfil its assigned mandate and meet its deadline, to which end she joined the calls for it to commence work in early 1999. Her country was ready to cooperate in concluding the substantial work on the Rules of Procedure and Evidence already undertaken in the Preparatory Committee. The General Assembly resolution on the establishment of the Court to be adopted at the current session should clearly set forth the Commission's mandate and forthcoming programme of work, as well as allocate sufficient meetings and resources for its task. Her Government remained fully committed to the Commission's fulfilment of its mandate as a matter of priority.

80. **Mr. Zackheos** (Cyprus) expressed his delegation's satisfaction with the outcome of the Diplomatic Conference, believing as it did that universal respect for humanitarian values was a prerequisite for the prevalence of justice. The genocides that had marked the century showed the necessity for effective permanent international machinery to bring to an end the culture of impunity.

81. It was perplexing that the crime of aggression had not, as the overwhelming majority of States clearly wished, been included among the crimes under the immediate jurisdiction of the Court. His delegation hoped that the Preparatory Commission would produce a definition of aggression and work out the conditions under which the Court would exercise its jurisdiction with regard to aggression. His delegation also attached great importance to the inclusion of the crime described in article 8.2 (b) (viii), namely population transfers by an Occupying Power. Moreover, the establishment of settlers in an occupied territory and the unlawful deportation of the population with a view to changing the territory's demographic composition were crimes that were covered by the provisions of articles 7.1 (d) and 8.2 (a) (vii), as well as 8.2 (b) (viii). Equally important were the provisions of article 8.2 (b) (ix) concerning attacks intentionally directed against places of worship, hospitals and other buildings dedicated to special purposes. As a victim of aggression itself, Cyprus could not but denounce such crimes and welcome their inclusion in the jurisdiction

of the Court. Cyprus had signed the Statute on 15 October 1998.

82. **Mr. Cunha** (Portugal) expressed his delegation's profound satisfaction at the establishment of the International Criminal Court, which supplied the missing link between the assertion of the rule of law and its effective enforcement. The adoption of the Statute was a historic step in that the participants in the Diplomatic Conference had overcome not only numerous complex legal problems but also fundamental political ones. It was a message to the world that justice had finally been perceived as an essential element of peace and that atrocities would no longer go unpunished.

83. The next step would be to draft the Rules of Procedure and Evidence and the Elements of Crimes. The Preparatory Commission should therefore be convened as soon as possible, and in any case no later than the early spring of 1999. It should receive adequate time, funding and secretariat services so that its mandate could be fulfilled no later than June 2000. Non-governmental organizations should be allowed to participate. Portugal, which had always been in favour of an independent and effective international criminal court, had signed the Statute. He hoped that by 2000 a large majority of Member States would have signed and ratified so that the Court would have unquestioned authority and the widest possible jurisdiction.

84. **Mr. Mirzaee Yengejeh** (Islamic Republic of Iran) noted the particular significance of the fact that the adoption of the Statute had taken place at the end of the United Nations Decade of International Law. An effective court aimed at deterring potential criminals would provide succeeding generations with the best hope for sparing the world from aggression and genocide.

85. The Statute, although the result of years of intensive negotiations, was still far from perfect, however. Not everyone was satisfied by some of its provisions and important points had been deferred for future consideration. It was, nonetheless, a complex text incorporating a number of issues currently falling within the jurisdiction of sovereign States and was thus currently under scrutiny by the relevant departments of his Government, which would decide on its next step in due course.

86. His delegation fully endorsed the resolutions adopted by the Conference, particularly resolution F on the establishment of a preparatory commission. The Commission faced a multifaceted responsibility: it had to prepare a number of instruments, make necessary arrangements for the commencement of the Court, finalize the draft Rules of Procedure and Evidence and Elements of Crimes and prepare

proposals for a provision on aggression. His delegation hoped that the Commission would be able to address some of the concerns raised during the debate in the Sixth Committee so as to pave the way for the universal acceptance of the Court.

87. **Mr. Wenaweser** (Liechtenstein) said that his delegation, which had actively participated in the preparatory process leading up to the Diplomatic Conference and been one of the first signatories of the Statute, reiterated its satisfaction at the outcome of the Conference. The Statute constituted a very solid basis for the punishment of those responsible for the commission of the most serious crimes under international law, and, perhaps even more importantly, for the prevention of such crimes. His delegation particularly welcomed the fact that the Statute provided for a uniform regime of jurisdiction for all States parties, that the Prosecutor enjoyed *proprio motu* competence and that the Statute recognized rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other forms of sexual violence as separate crimes under both articles 7 and 8. The section on crimes against humanity was well drafted and crimes committed at times of internal armed conflict had correctly been included. While not perfect, the Statute was very good and his delegation could therefore accept certain serious flaws in its text, particularly the provisions on preconditions to the exercise of jurisdiction and the articles on weaponry, which were too narrow.

88. It was of crucial importance that the momentum created at the Diplomatic Conference should be translated into determined action by the General Assembly. The outcome of the Conference should be acknowledged for the great success that it was, and the Preparatory Commission should be given the time and resources necessary to carry out its many difficult tasks.

89. His delegation would have preferred consensus on the Statute and it had taken note of the concerns expressed by some countries. Time and concerted efforts would be required to build awareness among those who had not felt able to vote in favour of the text. If the General Assembly resolution on the International Criminal Court could be adopted by consensus, it would be a step in the right direction.

90. **Mr. Mukongo Ngay** (Democratic Republic of the Congo) said that his was one of the few countries in the world which, owing to its geological configuration and huge natural resources, had from the dawn of history suffered appalling human rights violations. When, in 1960, it had declared its desire for sovereignty, it had fallen victim to conspiracies threatening its territorial integrity and the

legitimacy of its institutions. Violence still stalked its territory, in flagrant violation of the elementary rules of international law. The latest aggression – perpetrated by countries which had taken part in the Diplomatic Conference – had occurred a mere fortnight after the adoption of the Statute of the International Criminal Court. His delegation welcomed the fact that the Preparatory Commission would define the crime of aggression and the conditions under which the Court would exercise its jurisdiction.

91. It had been thought that the horrors of the Second World War would never recur, yet in the Great Lakes region terrible acts of extermination, deportation, rape of women and children and other atrocities were, even as he spoke, occurring on a vast scale in the areas occupied by those who had attacked his country. The invading forces had no scruples about opening fire on peaceful Congolese, thereby inaugurating a lawless society. The barbarity of the aggressors was such that in August 1998, for example, they had raped and disembowelled the pregnant wife of a village chief, whose body they had then exposed on the altar of the parish church. A number of nuns and over one hundred other people had been killed on the same occasion. A Ugandan journalist had bravely reported that soldiers of the Ugandan army regularly raped women and even girls under the age of 12. He would spare the Committee the details of the sabotage of industrial infrastructures or the incident – to take one example – in which a Congo Airlines Boeing 727 evacuating 41 passengers had been shot down on take-off at Kindu. If the International Criminal Court had been in operation, it might have prevented such crimes. Their perpetrators would have been punished and the introduction of the fascist, nazi and genocidal ideology could have been avoided.

92. As an innocent victim of the consequences of the genocide perpetrated in Rwanda by Rwandans against Rwandans, his country had declared itself in favour of an effective, independent, impartial and universal International Criminal Court. His delegation believed that such complex issues as the definition of crimes, complementarity, jurisdiction, the independence of the Prosecutor and relations with the United Nations had been satisfactorily regulated. Overall, it approved of the outcome of the Diplomatic Conference, although much remained to be done. It was regrettable that the Conference had been unable to reach a universally acceptable definition of terrorist or drug-related crimes. His delegation suggested that the Committee should establish working groups to consider the issues contained in paragraphs 5, 6 and 7 of resolution F of the Diplomatic

Conference until such time as the Preparatory Commission met.

93. **Mr. Farrell** (Ireland), said that the absence of a permanent criminal court had been felt all too often. It was for that reason that the international community had invested much time and energy in preparing a statute to govern the establishment of such a court. That milestone had been attained and Ireland, which had signed the Statute on 7 October, firmly believed that the Preparatory Commission should be given the necessary time to allow it to complete its work. His delegation would participate fully in the work on preparing provisions governing the crime of aggression, in order to ensure that the Court would be in a position to exercise its jurisdiction over that crime. Valuable work had been done on such provisions both before and during the Diplomatic Conference and that work should be built upon.

94. **Mr. Kosirnik** (Observer for the International Committee of the Red Cross) said that by adopting the Statute of the International Criminal Court the great majority of States had clearly demonstrated their resolve to put an end to the impunity enjoyed by the perpetrators of heinous crimes and to deter the commission of further violations. The International Committee of the Red Cross trusted that in its capacity as promoter and guardian of international humanitarian law it had made some contribution to the achievement. The obligation to prosecute war criminals already existed but was often ignored. It was therefore to be hoped that the Court, which was intended to be complementary to national criminal jurisdiction, would encourage States to adopt the legislation necessary to implement international humanitarian law and bring violators before their own courts.

95. On the whole, the International Committee of the Red Cross was satisfied with the Statute. Although not all serious violations of international humanitarian law were covered, a large number were. A particularly welcome feature was that the Court could try crimes committed during non-international armed conflicts; it had been recognized that rape, torture, wilful killing, hostage-taking and attacks against the civilian population were war crimes in internal armed conflicts as well as in wars between States. The Statute also identified more precisely acts which amounted to war crimes, such as rape, sexual slavery, enforced prostitution, pregnancy and sterilization and the use of children under the age of 15 to participate in hostilities.

96. It was regrettable that the provisions relating to the use of certain weapons had been reduced to a minimum and did not apply to non-international armed conflicts. It was to be hoped that the use of weapons of mass destruction,

anti-personnel mines and blinding weapons would be added to the list of war crimes at the Review Conference. An even greater disappointment arose from article 124, which created a distinction between war crimes and other crimes. Under the article, a State might declare that it did not accept the Court's jurisdiction for a period of seven years when war crimes were alleged to have been committed by its nationals or on its territory. The fact that war crimes were subject to a different regime gave the impression that they were not as serious as other crimes within the jurisdiction of the Court. Yet international law already placed States under an obligation to prosecute war criminals, irrespective of their nationality or of the place where the crime was committed. The International Committee of the Red Cross therefore urged States not to make such a declaration and trusted that eventually the provision would be deleted.

97. Much remained to be done before the Court became fully operational. Above all, as many States as possible should ratify the Statute. The International Committee of the Red Cross undertook to promote such ratification and to contribute to the formulation of the elements of war crimes. Furthermore, since the Statute specified that the Court had jurisdiction only when the repression of war crimes was not carried out at the national level, the International Committee of the Red Cross intended to continue its efforts to assist States in adopting national legislation for the prosecution of war criminals. Ratification by a large number of States would be a recognition of the need to ensure that the victims of atrocities were not forgotten and that those who committed such atrocities did not go unpunished.

The meeting rose at 1 p.m.



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Chairman: Mr. Enkhsaikhan (Mongolia)
later: Mr. Verweij (Vice-Chairman) (Netherlands)

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98-81838 (E)



The meeting was called to order at 3.10 p.m.

Agenda item 153: Establishment of an international criminal court (continued) (A/53/189 and 387)

1. **Mr. Tchatchouwo** (Cameroon) said that the elimination of impunity had marked a turning point in international relations. His Government was pleased that that point had been reached during the year which marked the fiftieth anniversary of the Universal Declaration of Human Rights.
2. His Government also welcomed the broad consensus on complex, difficult questions such as the inclusion of the crime of aggression, the principle of complementarity and the independence of the prosecutor. However, other unquestionably important issues had been left undecided. Resolution E, which appeared in the Final Act of the Conference (A/CONF.183/10*, annex I) recognized that crimes defined by treaty and, in particular, terrorist and drug-related acts, were serious crimes which might have fallen within the Court's competence had consensus been achieved. In view of the consequences and the frequency of those problems, his delegation strongly supported the recommendation that the Review Conference called for in article 123 of the Rome Statute (A/CONF.183/9*) should establish an acceptable definition of those crimes and add them to the list of those which fell within the Court's competence.
3. The Preparatory Commission mentioned in resolution F of the Final Act of the Conference would be responsible for drafting a provision on aggression, defining that crime and its elements and establishing the conditions under which the Court would exercise its jurisdiction. The General Assembly should convene the Commission quickly in order to implement the provisions of the Statute which concerned the court's jurisdiction over aggression. His Government had accepted that solution in a spirit of compromise, since it considered that aggression had already been defined by the General Assembly in its resolution 3314 (XXIX) of 14 December 1974, which had been adopted unanimously. The problem was that of the relationship between the new Court and the Security Council. There was great fear that the latter would be stripped of the powers granted it under Article 39 of the Charter. At the Rome Conference, his delegation had submitted a proposal (A/CONF.183/C.1/L.39), which included numerous clarifications of the definition of aggression and shed light on the conditions under which the Criminal Court would have jurisdiction.
4. He reiterated that the relationship between the International Criminal Court and the Security Council should be one of cooperation and complementarity insofar as the Court's purpose was to reinforce the Security Council's action in fulfilment of its mandate to maintain peace and international security under Chapter VII of the Charter. On the other hand, the Council's cooperation would be necessary to many of the Court's tasks. With respect to aggression, he knew of situations which had pitted States against each other, since aggression could be committed only by one State or group of States against another State. However, the Court would prosecute individuals, not States. The distinction was a fundamental one, since it allowed each body to act within its own sphere and its own competence. The fact that article 25, paragraph 4, of the Statute stipulated that no provision of the Statute would effect the responsibility of States under international law made it even less likely that any of the Court's decisions would take precedence over those of the Security Council.
5. The Security Council had the primary responsibility for maintaining international peace and security. However, while primary, that responsibility was not exclusive. The Court would have a complementary function in prosecuting and punishing individuals who, conveniently shielded by the State, prepared, ordered or launched aggression. In the past, the international community had dealt with such cases through the ad hoc international tribunals, as in the case of Rwanda and the former Yugoslavia.
6. The establishment of the International Criminal Court had brought about profound changes in the international order and had demonstrated the international community's abhorrence of atrocities. However, the road was a long one, and only 58 countries had signed the Rome Statute thus far. His Government was pleased to have been among the first to do so.
7. **Mr. Berteling** (Netherlands) said that he fully associated himself with the previous day's statement by the representative of Austria on behalf of the European Union. Mankind had made a great leap forward in the progressive development of international law, and his Government sincerely hoped that the establishment of the Court would help to deter potential perpetrators of crimes against humanity and genocide. As the end of the millennium and of the Decade of International Law approached, there was hope of an end to crimes such as those committed in Rwanda, Yugoslavia and Cambodia.
8. The Statute of the Court did not quite reflect the high expectations with which his delegation had gone to Rome. Nevertheless, it represented an acceptable compromise.

Many concessions had had to be made in the hope of achieving a consensus which, regrettably, had not materialized. Only a few countries, however, had voted against the Statute. His Government hoped that those States, whose position, moreover, was quite respectable, would nevertheless continue to contribute their valuable input to the discussions.

9. Three elements were of particular interest to his delegation. Firstly, the Statute was a carefully negotiated legal instrument which met the requirements and hopes of many representatives and experts from all the world's legal systems. Secondly, it provided balance between the provisions concerning complementarity and the principle of the supremacy of national jurisdictions. The Court had jurisdiction only if a State was unwilling or unable to exercise its own national jurisdiction. Thirdly, the prosecutor was to play a prominent, independent role.

10. The Netherlands was conscious of the honour that it had received in becoming the host State of the International Criminal Court and would do its best to ensure that the Court became a strong, well-respected body. His Government hoped that the Preparatory Commission, which was to be convened by the General Assembly, would have sufficient time and resources to finalize, as a matter of priority, the Rules of Procedure and Evidence and the Elements of Crimes in 1999 and 2000 by the target date of June 2000.

11. **Mr. Ogonowski** (Poland) said that he associated himself with the statement made under item 153 by the representative of Austria on behalf of the European Union. Poland had supported the idea of establishing an international criminal court from the beginning and welcomed the successful outcome of the Diplomatic Conference held in Rome. The establishment of the Court was an important step in the development of international law and in the promotion of respect for human rights. Among other things, it would enhance the role of justice, emphasize the primacy of the rule of law, strengthen international peace and security and discourage acts contrary to the basic principles of international law. The primary responsibility for prosecuting those responsible for the crimes falling within the Court's jurisdiction would remain with States. However, a lack of political will or inability to react to gross violations of international law would no longer mean impunity for the perpetrators of the most egregious crimes.

12. It was true that the Rome Statute did not fulfil all the hopes associated with the creation of the new Court. It was the result of a long, difficult process of negotiation and of many compromises. Some of its provisions limited the Court's powers, whereas Poland would have preferred an

even stronger Court. However, his Government was convinced that wide adherence to the Rome Statute would allow the new institution to become a pillar of international justice. The broad consensus on giving the prosecutor the authority to initiate investigations *proprio motu*, the agreement to include the crime of aggression and crimes committed during non-international conflicts, the establishment of the inherent jurisdiction of the Court, the confirmation of the principles of international law related to individual criminal responsibility, including the provisions on the irrelevance of official capacity and of the orders of a superior, and the taking into account of gender concerns would give the Court the instruments necessary to the effective discharge of its mandate.

13. His delegation also wished to underline the importance for the process of justice of guarantees for the accused, provisions on the protection of witnesses and victims, mechanisms for compensation and rehabilitation of victims and provisions on State cooperation and enforcement of sentences. It also welcomed the fact that the statute made provision for the principal legal systems of the world and for equitable geographical representation in the selection of judges. That could only enhance the authority of the Court's decisions.

14. Internal procedures for the signature of the Statute by Poland had already begun and they were expected to be finalized in the near future. In any case, the Preparatory Commission responsible for preparing draft texts on the Rules of Procedure and Evidence and of Elements of Crimes was yet to be convened. In order for it to complete those tasks before the end of June 2000, the work of the Commission should be considered a priority issue. His delegation intended to contribute to that work in the hope that the Court would start functioning before the target date.

15. **Mr. Ba** (Guinea) said that the establishment of the International Criminal Court by the international community on 17 July 1998 was an accomplishment of historic proportions. In future, any person who committed genocide, crimes against humanity or war crimes, would be brought before that Court, which filled a void in international criminal law.

16. Although the text of the Statute was not perfect, the States Parties would refine it over time. His delegation strongly supported the establishment of the Court, as was demonstrated by the fact that it had taken part in the deliberations of the Preparatory Committee at United Nations Headquarters and those of the Committee established in February 1998 in Dakar, Senegal, with a view to harmonizing the position of the African States with

respect to the Rome Diplomatic Conference. Guinea had signed the Final Act of Rome and would soon sign the Statute in New York. His Government would begin the ratification procedure when all the necessary formalities had been completed.

17. His delegation hoped that the Preparatory Commission provided for in the Final Act of the Rome Conference could meet as soon as possible so that the Court could start functioning and become a reality.

18. **Mr. Pérez-Otermin** (Uruguay) said that he supported the statement made by the representative of Panama on behalf of the member countries of the Rio Group, but wished to make some additional comments to underline the importance that his country accorded to the establishment of the Court.

19. His delegation had repeatedly indicated its support for the establishment of an international criminal court and had voted in Rome in favour of the Statute. Its primary aim — an aim that had unfortunately not always been well understood — had been to secure the broadest possible international support for the establishment and functioning of the new Court, because it had been and remained convinced that the Court could not be effective without universal support, especially the support of the major countries.

20. However, his delegation had some reservations with respect to the way in which the negotiations had been conducted. It endorsed the statement made the previous day by the Chinese representative, who had noted that the manner in which the Conference's deliberations had been conducted had not been the best way of guaranteeing the full participation of all countries in accordance with the principles of equality, democracy and transparency. The majority of countries had not been consulted on certain key articles. Some draft texts had not even been discussed and had been distributed to delegations just before the vote; that had not allowed many of them to review in detail what they had to vote on.

21. Quality could not be sacrificed for the sake of urgency. In Rome, his delegation had submitted several proposals, including a proposal on the principle of complementarity, which was one of the basic tenets of the Court's jurisdiction. As such, that principle should have been defined with greater precision in order to avoid a situation whereby its imperfection sowed doubts in the minds of the judges who would be responsible for applying it. The principle meant that there was no hierarchical relationship; in other words, the International Criminal Court was neither superior nor inferior to the national courts that it was supposed to

complement. A proper balance had to be found between the new authority, the International Criminal Court, and national judicial authorities and all the legitimately constituted authorities of States, including parliaments, to which the draft that had just been adopted would have to be submitted.

22. National parliaments would ultimately have to consider the Statute and adopt it in order for it to become a reality. The Court should therefore not make decisions in the place of the authorities of States governed by the rule of law. Otherwise, it would be acting on the basis of political criteria and would be substituting itself for national authorities; that would be far from complementarity. The principle should have been defined more clearly and his delegation was prepared to contribute to efforts towards that end.

23. **Ms. Kalema** (Uganda) said that the adoption of the Statute was a major step forward in the progressive development of international law. Her country remained committed to the establishment of the Court and had participated in the work of the Preparatory Committee and of the Conference and had signed the Final Act. It was in the process of studying the Statute with a view to signing it in the near future and hoped that the States which had not yet signed it would complete their internal procedures and ratify it.

24. Her delegation attached great importance to the following principles: the principle of complementarity, whereby the Court would exercise its jurisdiction only where national legal systems were unavailable or ineffective; the independence of the prosecutor; and automatic jurisdiction over the crimes covered by the Statute. However, it had a reservation with respect to the provision which stipulated that a State, on becoming a party to the Statute, might declare that, for a period of seven years after the entry into force of the Statute for the State concerned, it did not accept the jurisdiction of the Court with respect to war crimes. Her delegation hoped that the review process would take into consideration those other crimes which, in its view, should also be included in the Statute, such as illicit trafficking in drugs and terrorism.

25. The Preparatory Commission which had been given a mandate by the Final Act to prepare draft texts on the Rules of Procedure and Evidence and on the Elements of Crimes, and to define the crime of aggression should be established as soon as possible. That was the final phase before the Court could be established and become operational. It was therefore essential to give sufficient time and adequate resources to the Preparatory Commission so that it could carry out its work. In that connection, her delegation wished to thank those countries which had

contributed to the Trust Fund and had thereby enabled the least developed countries, including her own, to participate in the work of the Preparatory Commission and the Conference, thus guaranteeing universal participation.

26. At the previous meeting, one delegation had made defamatory, false and extremely regrettable accusations against Uganda and its Government. Those who wished to know the truth about the internal conflict which was tearing the country concerned apart and which also affected peace and security in Uganda and in the subregion, could refer to the statement made by the Ugandan Minister for Foreign Affairs in the plenary Assembly on 2 October 1998. Uganda's presence on the eastern borders of the country concerned was the result of an agreement concluded between the two Governments to put an end to rebel activities. The Ugandan Government fully respected the spirit and letter of the Universal Declaration of Human Rights, especially insofar as women and children were concerned. It wished to reaffirm its determination to cooperate closely with all States of the region, with the Organization of African Unity and the United Nations, and with all the parties concerned in order to find a peaceful and lasting solution to the conflict.

27. **Mr. Troyjo** (Brazil) said that the Rome Conference had been a milestone in the history of the international multilateral system. Fifty years had gone by before the international community had been able to arrive at a statute containing the necessary elements for the establishment of an efficient, independent and impartial court.

28. The impact of the Court would be felt well beyond the realm of international law, for it would contribute to the strengthening of peace and security throughout the world. For that reason, during the preparatory activities that had led up to the Rome Conference, his delegation had repeatedly expressed its firm support for the creation of the new jurisdiction. At the Conference, it had coordinated two informal negotiating groups on issues of relevance to the functioning of the Court. One of those groups had concentrated on the powers of the Prosecutor, particularly the *ex officio* powers. The other group had examined the key issue of the arms listed in the definition of war crimes.

29. His Government had voted for the adoption of the Statute. It believed that the Statute offered sufficient guarantees to ensure adequate complementarity between the Court and national jurisdictions. At the Conference, his delegation had stated its concerns with respect to the mandatory "surrender" of persons to the Court, which might be incompatible with certain provisions of the Brazilian Federal Constitution prohibiting the extradition of nationals. As far as the application of sentences was concerned, the

Brazilian Constitution also prohibited life imprisonment, which could also be seen as incompatible with the provisions of the Statute. Nevertheless, the provision relating to the revision of sentences after 25 years (art. 110) might mitigate that problem to a certain extent.

30. His delegation, too, was of the view that efforts should be made to repair the technical errors in article 121 of the Statute (Amendments). That was needed in order to protect the integrity of the Statute, which resulted from the efforts of many delegations and reflected a number of delicate compromises.

31. After signing the Final Act of the Rome Conference, his Government had undertaken a broad process of internal consultations with a view to taking a final decision on the ratification of the Statute. To that end, it needed to review the Statute in all its aspects and ensure that it was genuinely compatible with Brazilian domestic law. The process was being carried out in a transparent manner, with the participation of the legislative, executive and judicial branches, as well as representatives of civil society, especially from universities and law schools.

32. His delegation welcomed the establishment of the Preparatory Commission, which would pave the way for a fully operational International Criminal Court at the earliest possible date. His delegation attached particular importance to the rules of procedure and evidence, and was willing to participate actively in the work of the Preparatory Commission in order to contribute to the early and successful outcome of its deliberations.

33. **Mr. Bacye** (Burkina Faso) said that public opinion had heralded the establishment of the International Criminal Court as a diplomatic success whose importance was matched only by the founding of the United Nations. The Court was the outcome of a long and difficult process that had begun in 1946 with the establishment of the Nuremberg and Tokyo tribunals. It was the result of a compromise between different legal systems, which made it possible to punish the most heinous crimes against humanity. On the basis of its jurisdiction, its permanence and its universal character, the Court would provide an appropriate legal framework for the punishment of all grave breaches of fundamental rights; it would serve as a deterrent and eliminate the need for recourse to ad hoc tribunals, which were often sharply criticized and even suspected of giving preference to the winners of armed conflicts.

34. The Statute of the Court was compatible with the laws of Burkina Faso relating to human rights guarantees and the recognition of human rights. It would also provide support for his country's peacekeeping efforts in Africa.

35. During the previous 10 years, his Government had endeavoured to guarantee the exercise by all citizens of Burkina Faso of human rights and fundamental freedoms, to settle disputes and to establish preventive mechanisms. Many had interpreted the absence of an international criminal court as reflecting a lack of will on the part of the international community to punish crimes considered as peculiar to developing countries. The events in the former Yugoslavia, in the heart of "civilized" Europe, had been a reminder to all that the crimes in question were of no specific colour or socio-political character.

36. While the adoption of the Statute had enabled humanity to become reconciled with itself, the victory was not complete. His Government would have preferred for all States to adopt the Statute in Rome. Nevertheless, it continued to cherish the firm hope that those States which had voted against the Statute would eventually join with others in supporting it. For its part, Burkina Faso, which had participated actively in the Conference, would soon sign the Statute; it had been unable to do so up to then owing to legislative requirements.

37. **Mr. Hanson-Hall** (Ghana) recalled that during the recent general debate in the General Assembly, the President of his country had stated that the Rome Conference marked an important stage in the efforts of the international community to establish a legal and institutional framework for prosecuting perpetrators of genocide, crimes against humanity, war crimes and serious violations of international humanitarian law. It was to be hoped that the goodwill shown by the overwhelming number of States which had voted for the adoption of the Statute would also be reflected in the work of the Preparatory Commission, so that the court could be fully effective and functional.

38. With the adoption of the Rome Statute, the international community had scored a historic victory. The participation of 160 States, 31 organizations and a large number of non-governmental organizations attested to the seriousness with which the international community viewed the issue. His country was happy and proud to have been one of the first States to sign the Statute and the Final Act. It had initiated the domestic formalities for its ratification. It was regrettable, however, that the Conference had not reached a consensus and had had to resort to a vote. His delegation acknowledged that the Statute had defects and that it might not take into account sufficiently the legitimate interests and concerns of certain States. Nevertheless, his Government appealed to those States to take a more comprehensive view of the objectives of the Statute. International security was currently challenged by the barbaric conduct of a few individuals who believed that they could commit heinous

crimes with impunity. The international community had warned them that it would no longer tolerate such a situation.

39. The Rome Conference had decided to set up and convene a Preparatory Commission as soon as possible and to have the draft texts of the Rules of Procedure and Evidence and of the Elements of Crimes finalized before 30 June 2000. It was therefore necessary to proceed expeditiously. Moreover, the Commission should be provided with sufficient resources and enough time to fulfil its mandate. For that reason, his delegation called for the convening of the Preparatory Commission by the beginning of the second quarter of 1999 and for it to have three sessions during the year.

40. His delegation welcomed the fact that non-governmental organizations had participated actively in the Rome Conference, and proposed that they should be allowed to contribute to the deliberations of the Preparatory Commission. It also invited the Secretary-General to provide technical assistance to such States as might require it in drafting their implementing legislation. His delegation joined other delegations in calling for the establishment by the Secretary-General of a trust fund to enable developing countries to send their experts to participate in the Commission.

41. **Mr. Berman** (United Kingdom of Great Britain and Northern Ireland) fully associated himself with the statement made by the Austrian representative on behalf of the European Union and said that the United Kingdom had put sustained effort into the task of elaborating the Statute of the Court, as well as into the negotiations in Rome. The international community would not have achieved the satisfactory outcome in Rome without the truly remarkable groundwork done by the International Law Commission. As the United Kingdom Secretary of State for Foreign and Commonwealth Affairs had noted as the Rome Conference began: "The Court would also help countries recover from the trauma of war. Justice is an essential part of reconciliation. And the Court would give more strength to the rule of law, the foundation of our security and prosperity."

42. The United Kingdom would shortly be signing the Statute. His delegation took particular satisfaction at two of its aspects. One was the key part played by his delegation in securing definitions of war crimes and crimes against humanity. The inclusion of internal armed conflicts in the definition of war crimes was very welcome, as most of the violence in recent years had arisen in that context. Moreover, the Statute of the Court gave the Court power, under article 75 to order the payment of reparations to victims.

Accordingly, the Court would serve not just the interests of society in repressing crime, but also those of the victims of crime. The provision would also bolster the Court's role in deterrence.

43. The second aspect in which he took satisfaction was the set of provisions governing the nomination and election of judges to the Court, his delegation having long regarded that phase as fundamental. A claim to create a judicial institution in which some of the highest hopes of humanity resided could not be made without taking the same care over its membership as that taken with regard to national institutions. It was also a question of confidence: States could not be expected to subject high political interests to judicial decision without some guarantee of the highest judicial standards of integrity and impartiality. Lastly, it was a question of efficiency, namely, making sure that the Court demonstrated the highest degree of competence. In Rome, his delegation had put enormous effort into ensuring that the Statute contained three major elements: proper formulas for the qualifications and experience required of judges; a satisfactory system for the nomination of candidates; and appropriate rules governing the elections themselves. Although he had been surprised by the resistance which those efforts had encountered, it was important to confront such issues and arrive at an agreed solution. The result ensured that, from the pre-trial level until the end of the appeals process, the judges on the Court would have the necessary competence and experience and would demonstrate their integrity, which should serve to enhance the Court's authority.

44. The Sixth Committee would undoubtedly express the satisfaction of the delegations as a whole, even if it were cast in the more neutral terms required by diplomatic practice. His delegation's satisfaction was marred only by the fact that the Rome Conference was unable to achieve one of the objectives set out in its Rules, namely, to adopt the Statute by general agreement, particularly as it had worked so strenuously to that end. He hoped, however, that the matter would not end there and that considered reflection, away from the fevered heat of the Conference, would enable the dissenting States to rethink their conclusions thus turning widespread international support for the Statute into universal support.

45. Meanwhile, much remained to be done, as the creation of the International Criminal Court had not been achieved with the mere adoption of its Statute. The tasks ahead were to gather signatures, turn signatures into ratifications, rally the necessary political and financial support; and prepare for the election of judges and the Prosecutor. In addition, the Conference had assigned certain tasks to the Preparatory

Commission. In brief, those processes needed to be taken forward purposefully, but not rushed.

46. **Mr. Korzachenko** (Ukraine) said that the Statute adopted in Rome settled a number of controversial legal problems and successfully reconciled widely differing positions. Although the Court might not resolve all the problems of the contemporary world, it would remain the foundation of an independent, impartial and effective international system of criminal justice.

47. His delegation shared the view that the Preparatory Commission should begin meeting in April 1999 at the latest and meet as often as necessary; it must therefore be allocated sufficient financial resources. Ukraine attached substantial importance to the work assigned to the Preparatory Commission, which included elaboration of the Rules of Procedure and Evidence and the definition and Elements of Crimes of aggression, and the conditions under which the Court should exercise its jurisdiction. He concluded by saying that non-governmental organizations, whose contribution had been most useful throughout the negotiations, should be closely involved in the work of the Preparatory Commission.

48. **Mr. Gutierrez-Navas** (Honduras), speaking on behalf of Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua and Panama, said that the end of the cold war had brought international change of various kinds and created new hopes. The tragic acts of violence committed during the many internal and international conflicts which had erupted in different parts of the world had reopened the debate on the need to establish an international criminal court. Together with the Dominican Republic, the countries of Central America had supported the process of establishing such a court throughout all the stages involved: first, the resolution calling upon the International Law Commission to elaborate a draft statute, followed by the work conducted in the various sessions of the Preparatory Committee and finally by the Rome Conference itself, which had adopted the final text of the Statute. Both in the Preparatory Committee and in Rome, they had associated themselves with the many States wishing to establish a court that was characterized by legitimacy, efficiency, impartiality, transparency and moral authority and supported by the fundamental principles of complementarity, independence, competence and universality.

49. Although the Statute had not been adopted by consensus, the collective sentiment which finally prevailed was that the establishment of the Court met the aspirations of the majority of peoples of the United Nations, as attested

by the fact that 120 States had voted in favour of the Statute. She believed that the establishment of the Court would fill an institutional gap and mark a highly significant stage in the development of international law. It could even be said that, as the first judicial organ of such scope, the Court would introduce a new concept of the administration of international justice. It was the first time in the history of nations that the human aspiration for peace and justice had been so strongly expressed. The countries of Central America and the Dominican Republic would therefore participate in the work of the Preparatory Commission with the vigour and enthusiasm which they had shown in the Preparatory Committee and in Rome.

50. **Mr. Hamdan** (Lebanon) said that the number of speakers on the subject under discussion demonstrated the importance which the international community attached to the establishment of the International Criminal Court. The Statute adopted at Rome, however, still contained gaps. His delegation was therefore surprised that, in order to ensure diversity in the Office of the Prosecutor, one of the most important bodies of the Court, the criterion of nationality had been retained over that of legal systems. The Statute should be binding on all States, moreover, regardless of whether or not they were party to it.

51. The adoption of the Statute nevertheless ushered in a new era in international relations, which was to be welcomed. As indicated by Mr. Kirsch, Chairman of the Committee of the Whole in Rome, the Statute should not be regarded as a fixed text. On the contrary, it should evolve through refinement and adaptation on the basis of need.

52. His delegation believed that the Preparatory Commission should commence its work as soon as possible and that non-governmental organizations should be involved in the negotiations. Lastly, it supported the proposal to establish a trust fund for the participation in the work of the Preparatory Commission of the developing countries and the least developed countries.

53. **Mr. Sheimat** (Jordan) said that his country had signed the Statute on 7 October 1998. He trusted that the Preparatory Commission would begin its work as early as possible, since the world had need of an international court to try the authors of the abominable crimes wronging mankind.

54. He reiterated the position of the countries of the Non-Aligned Movement, as contained in the Durban Declaration, which he fully endorsed.

55. **Mr. Verweij** (Netherlands), *Vice-Chairman took the Chair.*

56. **Mr. Chkheidze** (Georgia) said that his country had known the horror of armed conflict since attaining independence. That was why it had been among the first to support the establishment of an international criminal court. Such an institution would make coexistence among States more secure and more peaceful. It will also lead the international community to a higher plane, since responsibility for arresting and prosecuting authors of the most odious crimes would become a collective responsibility.

57. Georgia had signed the Final Act of the Rome Conference because extension of the definition of war crimes to internal armed conflict represented a step forward. All that remained was to define aggression and the Elements of Crimes, and to establish Rules of Procedure and Evidence. Time was short, and the task should be completed immediately, in New York. In 1999 the Preparatory Commission was to hold an eight-week session, and a few weeks more in 2000 should suffice if sufficient resources were provided. In that regard he was of the view that non-governmental organizations should be invited to participate in the work, as they had at Rome. It would also be useful to have the cooperation of those States which had remained aloof from the Statute.

58. **Mr. Bello** (Nigeria) said that his delegation was convinced that the establishment of an international criminal court would contribute towards the maintenance of international peace and security. The international community should take all possible measures to ensure that the Court came into operation without undue delay. His delegation therefore supported the proposal in resolution F. Nevertheless he shared the reservations expressed by numerous delegations, in particular the Greek delegation, regarding the failure to unequivocally include the crime of aggression, the definition of which was to have been left to the Preparatory Commission. On that point there was something of a contradiction between the provisions of the Statute and resolution F regarding which body was responsible for that task. The Preparatory Commission should begin its work in the first quarter of 1999 and be provided with all the resources and services required to enable it to discharge its mandate efficiently.

59. His delegation supported the proposal contained in resolution E to convene a Review Conference to consider the possibility of including terrorism, drug crimes and the use of nuclear weapons and landmines in the list of crimes within the jurisdiction of the Court. It also supported the establishment of a trust fund to help developing countries to participate in the work of the Preparatory Commission.

60. **Mr. Erwa** (Sudan) said that the Sudan's position, in principle, was to support all judicial and other forms of peaceful settlement of disputes and, in general, everything that could contribute to the maintenance of international peace and security. Sudan was among the few countries to have accepted the compulsory jurisdiction of the International Court of Justice and it was well known that it had participated actively in the Rome Conference and exerted every effort to overcome all obstacles.

61. In the recent history of the Organization, the Charter had been misinterpreted by certain States. Thus, the Security Council had constantly protected certain countries which committed terrorism and occupied territories that did not belong to them. While those countries enjoyed complete impunity, others were subjected to sanctions and embargoes on the basis of mere suspicion and political prejudice. Scarcely one month after the end of the Rome Conference, an incident had taken place that confirmed that Member States were far from equal in rights and responsibilities. The strongest military Power in the world had attacked one of the least developed countries, the Sudan, invoking self-defence, in accordance with Article 51 of the Charter, to justify an attack against a pharmaceutical factory. Yet the same article established an obligation to seek a peaceful settlement. When the Sudan had demanded dispatch of a fact-finding mission, the aggressor had refused. His Government was thus impelled to ask whether it would be possible for the International Criminal Court to indict aggressors and try them, or whether the principle of no impunity would be selectively applied to try the weak and absolve the strong.

62. There was thus nothing surprising about Sudan's insistence that the Court should be completely independent of the Security Council and that aggression should be included in the list of crimes within its jurisdiction.

63. **Mr. Bogoreh** (Djibouti) said that by adopting the Statute of the International Criminal Court by an overwhelming majority, the international community had demonstrated its wish to end impunity. Unfortunately the tragic events taking place in Kosovo seemed to indicate that it had not been heard.

64. While signature of the Statute doubtless constituted a historical development, the final goal was far from being attained. Thus, the Preparatory Commission must draft the Rules of Procedure and Evidence together with the Elements of Crimes. Consideration must also be given to the financing of the Court. The method selected under the Statute was likely to make it subject to the goodwill of States, in particular the most powerful.

65. The shortcomings of the Statute must be corrected forthwith. International opinion would not understand a failure to include the crime of aggression, which was often the root cause of all other crimes, within the Court's jurisdiction. Similarly, it was incomprehensible that nuclear weapons should not appear in the list of weapons whose use would be considered a war crime.

66. He trusted that further consideration could quickly be given to the option of allowing a State Party to exclude its nationals from the Court's jurisdiction in respect of crimes committed on its territory for seven years following the entry into force for that State of the Statute. Only when such shortcomings had been corrected would the international community have an effective court with certain authority.

67. **Mr. Effendi** (Indonesia) said that Indonesia had from the outset attached great importance to the establishment of an international criminal court and had participated actively in the achievement of that goal in the meetings of the Preparatory Committee and at the Rome Conference. His delegation had always considered that the Statute should fully comply with the principles of international law governing relations between States. It was also of the view that the Statute should be a product of mutual cooperation among all nations, irrespective of differences in political, legal or social systems, and that it should scrupulously respect the principles of State sovereignty, territorial integrity and non-interference in the internal affairs of States. His delegation had also emphasized how important it was for the Court to be impartial and devoid of political influence of any kind, including by the Security Council.

68. It was not the occasion for a detailed analysis of the Statute. His delegation, for its part, would carefully examine all the provisions in accordance with those basic precepts, in particular the elements within the Statute relating to the jurisdiction of the Court. It must be remembered in that regard that the Court was complementary to national courts.

69. At every stage of the deliberations, Indonesia had attached great importance to achieving consensus and guaranteeing the universal character of the Court. For that reason, it deplored the fact that it had been necessary to resort to voting. It was his fervent hope that a spirit of cooperation would prevail in the work of the Preparatory Commission, whose deliberations were all the more important in that it had been entrusted with heavy responsibilities.

70. **Ms. Baykal** (Turkey) said that her country had supported the establishment of the Tribunals for the former Yugoslavia and Rwanda and, in that spirit, had participated actively in the work of the Rome Conference. Her

delegation, along with some others whose countries faced the scourge of terrorism on a daily basis, had proposed that terrorist crimes should be included in the Court's jurisdiction as crimes against humanity. It therefore regretted that such crimes were not covered by the Statute. However, the recommendation in the Final Act of the Conference that the crimes of terrorism and illicit trafficking of drugs should be included in the Court's jurisdiction was an encouraging prospect for the future. The Conference had also recognized that terrorist acts, by whomever and wherever perpetrated and whatever their forms, methods or motives, were serious crimes of concern to the international community.

71. Other delegations had already drawn the Committee's attention to the fact that one deficiency of the Statute was that a non-State party could not invoke the same grounds as a State party for refusing the Court's jurisdiction. In order for the Court to be strong and efficient, States should endeavour to resolve such problems within the limits of the rules of procedure of the Preparatory Commission and the Review Conference.

72. In conclusion, she said that at the 11th meeting of the Committee, one delegation had referred to the situation in Cyprus. In order to understand that situation, it was important for the Cypriot Turks, who were the true victims, to be heard.

73. **Ms. Chibanda-Munyati** (Zimbabwe) said that her delegation fully associated itself with the statement made by the representative of South Africa on behalf of the 12 members of the Southern African Development Community (SADC). Although her delegation had been among the first to sign the Statute, it was not entirely satisfied with the result. It would have preferred an independent, impartial court with automatic jurisdiction over the core crimes, including the crime of aggression, which had yet to be defined by the Preparatory Commission; moreover, the question of inclusion of the opt-in, opt-out clause and of modalities for its implementation remained unclear. Her delegation was not convinced that such a clause would not affect the smooth functioning of the Court.

74. The Preparatory Commission should be established as soon as possible so that all practical measures could be taken to ensure that the Court began its functions. A Review Conference should also be convened in order to give States parties an opportunity to reflect on the Court's performance. Lastly, it was essential to muster the political will to achieve universal acceptance of the Court. Her Government was pleased that the number of signatories had increased to 58 and urged States which had not yet signed the Statute to do so.

75. **Ms. Mekhemar** (Egypt) said that her Government attached such importance to the creation of the International Criminal Court that it had already established a committee of specialists responsible for making preparations for Egypt's adoption of the Statute. While not perfect, the Statute had succeeded in achieving a compromise between often-contradictory interests. Egypt, for its part, would have preferred the Court to be independent of any political body, whereas, in the Statute as adopted, the Security Council had the right of veto. Thus, it could prevent the Court from acting under Chapter VII of the Charter of the United Nations. It was also unfortunate that the Statute made no mention of nuclear weapons or of the nuclear threat, which therefore did not fall within the Court's jurisdiction. That reasoning was somewhat paradoxical, as was that which had established aggression as a special case.

76. Despite all those shortcomings, Egypt had not forgotten the Statute's strengths: it would henceforth provide a mechanism for the punishment of war crimes, crimes against humanity and genocide and would also protect children in situations of armed conflict. It also had the advantage of settling the question of the transfer of authority of an occupying Power over the occupied territory and that of the establishment of colonies, thus strengthening and expanding international law.

77. With regard to resolution "F", which concerned the Preparatory Commission, she was very optimistic as to the likelihood of achieving an adequate definition of aggression. In any case, the Commission would have a great deal of work to do and must be provided with adequate resources so that it could complete its task before the year 2000.

78. **Mr. Westdickenberg** (Germany) said that his delegation associated itself with the statement made by the representative of Austria on behalf of the European Union. In the past, atrocities had gone unpunished not because of a lack of national or international norms penalizing those heinous acts, but rather because of the inability or unwillingness of national courts to act. Thus, a new chapter in public international law would be opened and a serious shortcoming redressed. The International Criminal Court, by its very existence, would deter individuals from committing crimes by enforcing accountability.

79. Various important elements made the Rome Statute a milestone. First, the Court would have jurisdiction with respect to the four most serious crimes affecting the international community. Second, that jurisdiction could be exercised if the State on whose territory the crime had been committed or of which the accused person was a national was a party to the Statute. The Court could also act if the

Security Council, under Chapter VII of the Charter of the United Nations, called on the Prosecutor to investigate a situation in which one of the four crimes in question appeared to have been committed. The Prosecutor could also initiate investigations *proprio motu*. Lastly, the Court would work on the basis of the principle of complementarity: it would act only when national courts were unwilling or unable to prosecute a crime. The fact that the Statute had already been signed by an impressive number of States was proof of the importance of those elements and Germany, for its part, planned to do so by the end of the current year.

80. However, much remained to be done before the Court could begin its work. In preparing its draft resolution on the matter, the Committee should endeavour to give further momentum to the establishment of the new institution by calling for the Preparatory Commission to be convened as soon as possible and ensuring its financing. Because the Preparatory Commission would need to prepare additional legal instruments, it was important for all States to cooperate so that it could work efficiently and complete its task in 1999. If necessary, it could be reconvened in the year 2000 prior to the target date of 30 June 2000.

81. Above all, the Preparatory Commission would have to agree on a definition of aggression as stipulated in resolution "F", adopted in Rome. In his delegation's view, it should focus on the topics mentioned in that resolution, including the rules of procedure and evidence and the elements of crimes. It should not devise additional instruments since that was the task of the Review Conference. Furthermore, since the Statute had been adopted by an overwhelming majority of the States present in Rome, there was no reason to reconsider an instrument which had already been accepted by 120 States or to call in question certain issues which had already been resolved by the final compromise proposed by the Bureau of the Committee of the Whole of the Conference.

82. In preparing the instruments requested of it, the Preparatory Commission should not become entangled in details and should endeavour to work out compromises. It was clear that that work would take most of its time. It should also trust the experts on procedural matters and not spend too much time discussing the so-called "elements of crimes". The Statute itself already stated that those elements would "assist the court in the interpretation and application" of the relevant articles. The other instruments, such as the headquarters agreement, financial regulations and agreement on privileges and immunities could be dealt with on the basis of the precedents already established by other international institutions.

83. **Mr. Tabone** (Malta) said that his country was proud to be one of the 58 States which had already signed the Rome Statute and encouraged States which had not yet signed it to do so as soon as possible. In September 1997, Malta had hosted a regional conference on the establishment of a permanent international court, a sign of the importance which it attached to the creation of a judicial mechanism that would make it possible to try impartially individuals who had committed crimes of international scope.

84. Despite its shortcomings, the Statute signed in Rome had laid the foundation for a strong, effective Court. He associated himself with the delegations which had called for the Preparatory Commission to begin its work as soon as possible and to meet as often as needed to accomplish its task.

85. **Ms. Cueto Milián** (Cuba) said that the Committee had heard some very different views on the Statute of the International Criminal Court. It had seen evidence of the insolent power of countries which regarded themselves as being at the centre of the universe. The falseness of their positions and their arguments was evident, as was the hollowness of the calumnies they addressed to those who still dared to call things by their real names. In Cuba one called an aggressor an aggressor, and a mercenary a mercenary.

86. Nothing that had been said in the Committee inclined Cuba to change the position it had defended in Rome. In Cuba's opinion the Statute did not meet the aspirations of the great majority of humankind, particularly the peoples of the South. The desire had been to condemn the worst crimes known to humanity, yet aggression, drug trafficking and terrorism had been passed over in silence. Were those crimes perhaps not sufficiently odious? Were the elements of a definition lacking? No. It was the political will that was lacking.

87. Certain delegations were inviting the Committee to look to the future and not to return to what had taken place in Rome. One could not draw that many lessons from the experience of Rome: the development of the concept of a crime against humanity on the one hand, and also the confusion into which many delegations had stumbled between customary law and treaty law. Furthermore, many of those delegations that were concerned about the future had had no hesitation in subordinating the Court to the will of the Security Council. It would seem that when they came face to face with justice some were more equal than others.

88. Some would like to have the international community regard the establishment of the tribunals for the former Yugoslavia and Rwanda as an act of altruism. But they were

special tribunals which even those who had set them up defined as subsidiary bodies of the Security Council. It was also the other Member States that financed their budget which, it should be remembered, was five times that of the International Court of Justice.

89. In conclusion, she thanked all those delegations which, both before the Rome Conference and during it, had supported Cuba in its appeal for the embargo imposed on it to be defined as a crime of extermination, a crime of aggression and a crime against humanity.

90. **Mr. Vasquez** (Ecuador) associated his delegation with the statement made on behalf of the Rio Group. It was in response to the universal indignation provoked by the most odious crimes that his country had participated from the very beginning in planning the establishment of an international criminal court. The negotiating process had met all its expectations, to the point where it would be possible to envisage one day justice that was without borders.

91. His delegation also wanted to highlight the considerable role played in the process by civil associations and non-governmental organizations.

92. Ecuador had ratified the Statute on 7 October 1998. It was perfectly willing to cooperate with other interested States to make the work of the Preparatory Commission a success so that the Criminal Court could become operational as quickly as possible.

93. **Mr. Dabor** (Sierra Leone) thanked all the countries which had contributed to the Trust Fund which had enabled a large number of developing countries to attend and participate in the Rome Conference, and all the non-governmental organizations which had played an important role in the process. The Statute adopted after six weeks of hard negotiations might not satisfy all delegations in all respects, but for Sierra Leone it was a great achievement. Sierra Leone had signed the Final Act in Rome, and was ready to sign the Statute in New York.

94. Much remained to be done. The crime of aggression had to be defined, and the Preparatory Commission had to be established as soon as possible. Thus far, 58 States had signed the Statute; all those which had not yet done so should sign without delay. Countries which had expressed their opposition should reconsider their position. For the Court to be truly universal in character and therefore genuinely effective, it must have the support of all nations, especially the most powerful. That was also why the door should be left open to negotiations.

95. **Ms. Eugène** (Haiti) expressed the hope that the Review Conference would be organized as soon as possible

with a view to incorporating other elements that were still pending and finding an accurate definition of the term aggression. She agreed with those who were proposing that the crime of terrorism should be one of those that fell within the Court's jurisdiction. However, she did not agree with those countries which wanted to add the death penalty to the penalties that could be imposed by the Court, because the death penalty had been abolished in Haiti.

96. **Mr. Mukongo Ngay** (Democratic Republic of the Congo) said he wished to refute a statement in which a delegation had denied the reality of the aggression of which his country was a victim. It had been an attempt to delude the international community into believing that it was a question of implementing a military cooperation agreement, whereas all agreements of that kind had already been denounced by the new Congolese Government. In any event, a military agreement would not explain why Ugandan soldiers had penetrated more than 500 kilometres into Congolese territory and invested Kisangani, the country's third largest city.

97. **Ms. Kalema** (Uganda), speaking in exercise of the right of reply, said that the affair to which the representative of the Democratic Republic of the Congo had referred did not fall within the Committee's competence.

98. **Mr. Michaelides** (Cyprus), speaking in exercise of the right of reply, reminded the representative of Turkey that the Government of Cyprus was the only internationally recognized Government on the island. It represented all the citizens of the Cypriot Republic wherever they were in its territory. The Turkish Cypriot government and the presence of Turkish soldiers in Cyprus had been declared "illegal and invalid" by the Security Council, in particular in its resolutions 541 (1983) and 550 (1984).

99. **Ms. Baykal** (Turkey) said that the delegation of Cyprus was merely repeating allegations which Turkey had already denounced as false. She expressed the hope that the Turkish Cypriot community would also be able to have its voice heard.

100. **Mr. Michaelides** (Cyprus), speaking in exercise of the right of reply, repeated that the Security Council resolutions considered as "illegal and invalid" the measures taken by the Turkish Cypriot government. He read out the main passages in those resolutions.

101. **The Chairman** said that the general debate on agenda item 153 had been concluded, and summarized its main conclusions. Delegations which had taken the floor had all expressed hope and optimism. They had shown themselves to be aware of the need to give the Preparatory Commission

the time and the means it needed, and of the importance of the trust fund for the participation of the least developed countries. Many States, however, had had reservations regarding the Statute as adopted in Rome. But all were agreed in believing that the Preparatory Commission must enjoy the support of all States, even those which were hesitant. It would be the very body in which it would be possible to bring all the different points of view together.

The meeting rose at 6.45 p.m.



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Chairman: Mr. Enkhsaikhan (Mongolia)

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98-81901 (E)

The meeting was called to order at 10.20 a.m.

Agenda item 150: Report of the International Law Commission on the work of its fiftieth session (A/53/10)

1. **Mr. Baena Soares** (Chairman of the International Law Commission) said that on the occasion of the fiftieth anniversary of the International Law Commission, it was worthwhile to point out that the Commission had played a central role in the progressive development of international law and its codification. It had produced over 20 sets of draft articles setting forth basic rules in most of the key areas of international law, ranging from State jurisdiction to the position of the individual, and from succession of States to natural resources and economic relations. Some of the most prominent examples were the law of diplomatic and consular relations, the law of treaties, the law of the sea and the law of international organizations. The global treaties had played a fundamental role in international law, and even the draft articles had exerted a substantial influence on the practice of States and of international organizations.
2. At its fiftieth session, the Commission had held a seminar to evaluate critically its work and the lessons learned for its future. It had taken advantage of the ideas and suggestions that had emerged from the 1997 Colloquium held by the Sixth Committee at the request of the General Assembly (resolution 51/160, para. 18). He noted with satisfaction that the proceedings of the Colloquium had been published in June 1998 under the title "Making better international law". He had been informed that the report on the International Law Commission seminar held in April 1998 would also be published soon.
3. The draft statute of an international criminal court prepared by the Commission in 1994 had served as a useful basis for the recently adopted Rome Statute. It was most gratifying that delegates had referred to the Commission's contribution in that regard.
4. At its fiftieth session, the Commission had made significant progress in several areas. The topic of international liability had been on its agenda for a very long time; the new approach it had adopted had enabled it to complete at that session its first reading of a set of 17 draft articles with commentaries on prevention of transboundary damage from hazardous activities. Before embarking on its final reading, the Commission would like very much to have the views of the Governments on the subject.
5. Another important achievement of the Commission's 1998 session had been its work on State responsibility and reservations to treaties. In 1997, the Commission had completed its first reading of the draft articles on State responsibility. In 1998, in the light of Governments' comments and observations, it had further clarified several general but important issues, most importantly the distinction between "criminal" and "delictual" responsibility. On the topic of reservations to treaties, the Commission had adopted seven draft guidelines pertaining to the definition of such reservations. It had then moved on to the definition of interpretative declarations. Again, the Commission looked forward to Governments' comments on the guidelines.
6. The Commission had also considered and reviewed the first reports on two new topics: diplomatic protection and unilateral acts of States. It had established specific premises on which further work should be conducted. The respective Special Rapporteurs had been requested to submit further reports on the basis of those premises.
7. With regard to the topic of nationality in relation to the succession of States, the Commission had formed a working group to examine the question of the nationality of legal persons. Certain preliminary conclusions had been reached and had been submitted in the report. Governments' views on those conclusions would be welcomed.
8. The Commission had continued its fruitful examination of its working methods and work programmes. It had paid special attention to its long-term programme of work and had identified and examined a number of topics for future consideration. In addition, the Commission had continued its useful cooperation with other intergovernmental regional bodies working in the field of public international law. It was worth noting, in particular, the very useful exchange of views with the International Court of Justice.
9. Recalling that in keeping with the tradition of the Sixth Committee, his statement would be delivered in three parts, he said that for the time being, he would refer only to chapters I to V of the report of the Commission (A/53/10).
10. Chapter I was the introduction, and dealt with general issues relating to the membership and officers of the Commission. As in the past, chapter II provided a brief overview of the work of the Commission during its fiftieth session. Chapter III, which had been prepared in response to requests by Governments, listed questions about the work of the Commission on which comments by Governments in the Sixth Committee were particularly helpful to the Commission. The purpose of the chapter was to draw the Committee's attention to the important issues raised in the report, and it was hoped that it would serve as a focus for the Committee's discussion.

11. Chapter IV dealt with international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities), a topic on which the Commission had made remarkable progress during its fiftieth session. The Commission had completed the first reading of 17 draft articles on the topic, the texts of which were included in the report. Most of them drew their inspiration from the articles adopted by the Working Group of the Commission in 1996, which had been reconsidered in light of the Commission's decision to focus first on the prevention aspect of the topic as well as on relevant recent developments, especially the adoption of the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses. In particular, he wished to draw attention to the specific questions raised by the Commission in paragraphs 31 to 34 of the report.

12. Article 1 set forth the scope of the draft articles, namely activities not prohibited by international law which involved a risk of causing significant transboundary harm through their physical consequences. For a number of reasons, which were discussed in paragraph (1) of the commentary to the article, the Commission had chosen to define the scope in general terms rather than listing the activities to which the draft articles would apply. The expression "risk of causing significant transboundary harm", as well as the term "harm", were further explained in article 2 on the use of terms. He emphasized that, as indicated in the relevant commentary, the draft articles applied where the combined effect of risk and harm reached a level that was deemed significant.

13. The term "significant" constituted a threshold that had found wide acceptance in international law. It was also clear from the definition of "transboundary harm" in article 2 that the draft articles applied only where an activity caused harm in the territory of or in other places under the jurisdiction or control of a State other than the State of origin. Harm to the global commons per se was thus excluded from the scope of the text.

14. Articles 3 and 4 constituted the cornerstones of the draft articles, setting out the general principles from which the other draft articles were derived. Article 3 embodied the fundamental rule that States must take all appropriate measures to prevent, or to minimize the risk of, significant transboundary harm. As was clear from the commentary, the Commission had considered that to be an obligation of due diligence and not an obligation of result. The question arose, nevertheless, as to the consequences of non-compliance with the duty of prevention in the absence of damage, and the Commission would appreciate the guidance of States on that

issue. He referred members again in that connection to paragraph 32 of the report.

15. The principle of cooperation between States concerned, namely the State of origin and the State or States likely to be affected, which was reflected in article 4, was essential in designing and implementing effective policies to prevent, or to minimize the risk of, significant transboundary harm. As provided in the article, in certain cases, the assistance of one or more international organizations might be useful in that regard. It was important to stress that the principle of good faith must govern any measures of cooperation taken by States in order to prevent transboundary harm or to minimize the risk thereof.

16. Article 5 dealt with the question of the implementation of the provisions of the draft articles. It was left entirely up to States what measures to adopt, but some measures were mentioned in the article to provide guidance in that respect. Reference was thus made to legislative and administrative action, as well as to the more concrete measure of establishing suitable monitoring mechanisms.

17. The last article of a general nature was article 6, which was in fact a saving clause. It underlined the residual character of the draft articles, which applied only in situations not governed by more specific international rules or regimes.

18. Turning to the articles which spelled out more in detail how the duty of prevention of transboundary damage was to be implemented, he observed that article 7 set forth the fundamental principle that the prior authorization of a State was required for activities carried out in its territory or otherwise under its jurisdiction or control which involved a risk of causing significant transboundary harm. Such authorization was also required for a major change in an activity which had already been authorized, as well as for any change which transformed a non-hazardous activity into one involving a risk of transboundary harm.

19. It would of course not suffice to apply the requirement of prior authorization only to hazardous activities undertaken after the State of origin adopted the regime contained in the draft articles. Pre-existing activities must also be brought under the regime of prior authorization to ensure compliance with the duty of prevention. Article 7 also addressed the question of the consequences of the failure of an operator to conform to the requirements of an authorization, albeit in a general manner, by requiring the State of origin to take appropriate action, which could in extreme cases include the termination of the authorization.

20. In order to decide whether a particular hazardous activity should be authorized, the State of origin must evaluate

the possible transboundary harm caused by that activity. The requirement that an impact assessment be undertaken was reflected in article 8 in very general terms. Indeed, the prevailing view had been that the specifics of the content of the assessment should be left to domestic legislation. Some members, however, had felt that it was desirable to provide some guidance to States in that regard.

21. Article 9 was inspired by new trends in international law, in particular international environmental law, which sought to ensure that individuals whose lives, health, property and environment might be affected were involved in the decision-making process by providing them with a chance to present their views to those ultimately responsible for making the decisions. It should be noted that States were required to provide information not only to their own public, but also to that of other States.

22. The duty of notification was the subject of article 10. Thus, where the assessment of an activity's impact indicated a risk of significant transboundary harm, the State of origin must notify the States likely to be affected and provide them with relevant information, pending any decision on the authorization of the activity. The article balanced that obligation imposed on the State of origin by requiring that States likely to be affected should respond within a reasonable time to the notification, so that the decision whether an activity might be authorized would not be delayed indefinitely.

23. The same concern of balancing the interests of States concerned underlay article 11, regarding consultations on preventive measures. The parties must enter into consultations in good faith and must take into account each other's legitimate interests, the purpose being to achieve mutually acceptable solutions on measures to prevent or minimize the risk of significant transboundary harm. If that objective was not achieved, the State of origin might proceed with the activity, but in so doing, must take into account the interests of the States likely to be affected.

24. Article 12 contained a non-exhaustive list of factors that States were to take into account in the course of consultations so as to achieve an equitable balance of interests. The relevance of a particular factor would depend on the specific circumstances of a case, but article 12 provided some guidance in that respect.

25. The situation where a State had reasonable grounds to believe that an activity carried out in another State involved a risk of significant transboundary harm but had received no notification to that effect from the State of origin was addressed in article 13. In such a case, the former State might request the State of origin to apply the notification procedure described earlier. In some instances, however, the absence

of notification was not due to an oversight on the part of the State of origin, but to its belief that the activity in question did not pose any risk. If disagreement persisted on that issue between the States concerned, they could hold consultations. It was important to note that paragraph 3 of article 13 further safeguarded the interests of the State likely to be affected; indeed, if so required, the State of origin must adopt appropriate measures to minimize the risk of the activity, and in certain cases it might even be obliged to suspend the activity for a period of six months or as otherwise agreed.

26. The obligation to exchange information regarding the prevention or minimization of the risk of significant transboundary harm was not limited to the authorization phase, but was a continuous duty. That was made explicit in article 14. However, there was an exception to the obligation to provide information under the draft articles: as indicated in article 15, States were not obligated to disclose information vital to their national security or to the protection of industrial secrets.

27. The Commission had considered it necessary to protect not only the interests of the States likely to be affected by a hazardous activity, but also the interests of natural or juridical persons thus affected. Article 16 therefore provided that in the absence of an agreement on the issue between States concerned, the State of origin must grant access to its judicial or other procedures for seeking protection or redress without discrimination on the basis of nationality, residence or the place where the injury might occur.

28. Lastly, article 17 provided for compulsory resort to the appointment of a fact-finding commission if the parties to a dispute concerning the draft articles were unable to agree on a means of settlement within a period of six months. The Commission realized that article 17 required further elaboration in regard to the establishment and functioning of such a commission, but had felt that it was premature to go into further detail before a decision was taken as to the form of the draft articles. The comments of States on that issue would be particularly welcome.

29. Chapter V was devoted to the topic of "Diplomatic protection". In his report, the Special Rapporteur had sought the views of the Commission on a number of basic issues which underlay the topic and were divided into two broad categories, namely the legal nature of diplomatic protection and the nature of the rules governing diplomatic protection.

30. With regard to the legal nature of diplomatic protection, the Special Rapporteur had explained that at the heart of diplomatic protection there was a dispute between a host State and a foreign national whose rights had been denied and who had suffered injury as a result. If the foreign national was

unable to internationalize the dispute and take it out of the sphere of local law, his or her State of nationality, at its discretion, could espouse the individual's claim by having it undergo a veritable "transformation". The Special Rapporteur had noted two important developments. First, States through agreements recognized the right of the State of nationality to take action, including before an arbitral body, to enforce the rights accorded by the treaty to their nationals. Second, individuals, by treaties, were granted direct access to international arbitration. The Special Rapporteur believed that those developments and the fact that some legal personality was conferred on the individual, as the direct beneficiary of international law, led to more clear-cut doctrinal queries concerning the relevance of the traditional view of diplomatic protection.

31. The Special Rapporteur considered that the nature of the rules governing diplomatic protection depended on whether one took the traditional view that a State was enforcing its own right by endorsing the claim of its own national or a more contemporary approach which suggested that the State was simply an agent of its national who had a legally protected interest at the international level. The approach chosen would have practical implications for the formulation of the provisions relating to the topic.

32. The Commission had generally agreed that the topic dealt with a complex issue of great practical significance and that there was hardly any other topic that was as ripe for codification as diplomatic protection and on which there was such a comparatively sound body of hard law. It had been noted that the original purpose of the institution of diplomatic protection had been to mitigate the disadvantages and injustices to which natural and juridical persons had been subjected. Hence, far from being an oppressive institution, diplomatic protection had at least partially rectified the injustices of a system that reduced the individual, and specifically the private individual, to the rank not of a subject of international law, but of a victim of violations of that law. Some members of the Commission considered that diplomatic protection was a construction in the same sense as the concepts of possession and ownership. For that reason the diplomatic protection in the context of the *Mavrommatis* construct should not be considered a fiction.

33. As for the question of who held the right exercised by way of diplomatic protection – the State of nationality or the injured victims – many members of the Commission considered that diplomatic protection had always been a sovereign prerogative of the State as a subject of international law. Had it been otherwise, no agreement would have been concluded after the Second World War regarding indemnification for nationalized property.

34. With regard to the relationship between human rights and diplomatic protection, a number of comments had emphasized the need for caution in assimilating the two institutions or establishing a hierarchy between them. It had been noted that, while it was true that the law of diplomatic protection had existed long before the emergence of human rights as a term of art in international law, the two approaches had existed in parallel, and their respective potentials had overlapped only partially. To jettison diplomatic protection in favour of human rights would be, in some instances, to deprive individuals of a protection which they had previously enjoyed. Of course, human rights could now serve to buttress the diplomatic protection exercised by the State of nationality. In that context, it had been noted that the traditional "*Mavrommatis* approach" to diplomatic protection thus had its strong points and should not be discarded without careful consideration of what was required in order to render the individual's rights effective. It had also been noted that the human rights approach could be allowed to permeate the Commission's further debate on the topic on a case-by-case basis, but the Commission must not continue to question the very underpinning of diplomatic protection in adopting such a focus.

35. It had been stated that the necessary preconditions for diplomatic protection were that there must be proof that an injury had been inflicted on a national; that the injury was a breach of international law; that it was imputable to the State against which the claim had been brought; and, lastly, that a causal link existed between the injury inflicted and the imputation of the injury. There would thus be three main protagonists in an international claim for diplomatic protection: the subject whose person, property or rights had been injured; the State causing the injury; and the State espousing the claim. The second precondition for the exercise of diplomatic protection was that the injured subjects must have been unable to obtain satisfaction through domestic remedies which afforded the State an opportunity to avoid a breach of its international obligations by making timely reparation.

36. Some members considered that the basis for the prior exhaustion of local remedies was empirical and that there might be circumstances in which the requirement did not apply, such as in the absence of any prior voluntary connection with the jurisdiction concerned. The view had also been expressed that the requirement of the exhaustion of local remedies entailed a further consequence that the model of subrogation could not be applied to diplomatic protection, as there was a fundamental change in the character of the right.

37. In the context of local remedies, the question had arisen as to whether the minimum standard of treatment accorded

to aliens under international law should be the sole standard and whether the standard of treatment should not be defined by reference to domestic law, so as to avoid conferring privileged status on aliens. To be sure, application of either standard would give rise to controversy, given the cultural, social, economic and legal differences which might exist between the host State and the foreign State. It had been further noted that the State defending its nationals could not, in the exercise of diplomatic protection, have recourse to the threat or use of force. Hence, an important contribution the Commission could make in its consideration of the topic was to identify what means were available to States in making their rights and the rights of their nationals effective in the context of diplomatic protection.

38. Questions had been raised as to whether a State could exercise diplomatic protection in parallel with an international recourse taken directly by an injured individual or whether the State only had the right to exercise diplomatic protection after all other domestic modes of dispute settlement had been exhausted.

39. As to the question whether the topic dealt with primary or secondary rules, it had been observed that such theories and concepts could not helpfully be discussed before addressing the institutions and rules of diplomatic protection. Those points could be debated as they came up in specific contexts.

40. In order to assist the Special Rapporteur, the Commission had established a Working Group to provide directions in respect of issues which should be covered in his second report. The Working Group's conclusions were contained in paragraph 108 of the Commission's report.

41. **Mr. Fomba** (Mali), referring to the topic "Diplomatic protection", said that Mali agreed with the Working Group's first conclusion that the customary law approach to diplomatic protection should form the basis for the Commission's work on that topic. As the Special Rapporteur had noted, the topic "Diplomatic protection" involved mainly codification and its customary origin had been shaped by the dictum in the *Mavrommatis Palestine Concessions* case.

42. With regard to the second conclusion, while Mali agreed that the topic should deal with secondary rules of international law relating to diplomatic protection, it did not believe that international law could be placed in watertight compartments of "primary" and "secondary" rules. Mali agreed with the Special Rapporteur that the Commission should discuss primary rules only where necessary for the appropriate codification of secondary rules. Theories and concepts such as the distinction between primary and secondary rules could not helpfully be discussed before

addressing the institutions and rules of diplomatic protection. Mali likewise considered that the study of diplomatic protection must also include study of the means for exercising it, namely, the traditional machinery for the peaceful settlement of disputes and the question of countermeasures.

43. Mali supported the Special Rapporteur's suggestion that the title of the topic should be changed to "Diplomatic protection of person and property", which appeared more in line with its content and clarified the distinction between that topic and those dealing with diplomatic and consular relations.

44. With regard to the third conclusion, Mali agreed that the exercise of diplomatic protection was the right of the State. In the exercise of that right, the State should take into account the rights and interests of its national for whom it was exercising diplomatic protection. That conclusion pointed to the need for greater emphasis to be placed on the progressive development of customary law based on the international community's recognition of human rights.

45. The Special Rapporteur had correctly posed the questions whether diplomatic protection was a right of States or of individuals and what practical consequences the choice of one or the other might have on the formulation of provisions on the topic. Clear-cut and realistic replies must be found to those as well as to the following questions: Was there in international law a right of the individual to diplomatic protection? If so, to what extent had that right been established? What were or would be the consequences of that right in relation to the discretionary power of the State to refuse or to grant protection and to its right to determine reparation? Did recognition of the right of individuals to direct access to international judicial forums not call in question or change the nature of the traditional conception of diplomatic protection? Lastly, it was essential to distinguish between the "desirable" and the "possible" and to take account of the legal and political aspects as well as of the interests of the State and of the individual.

46. With regard to the fourth conclusion, Mali shared the view that the Commission's work on diplomatic protection should take into account the development of international law in increasing recognition and protection of the rights of individuals and that the actual and specific effect of such developments should be examined in the light of State practice.

47. With regard to the fifth conclusion, Mali supported the view that the discretionary right of the State to exercise diplomatic protection did not prevent it from committing itself to its nationals to exercise such a right. Mali's own Constitution of 25 February 1992, although very progressive

in the area of human rights, did not specifically recognize the right of Malians to diplomatic protection, even though the protection of Malians abroad was one of the declared aims of his Government's foreign policy.

48. With regard to the sixth conclusion, Mali shared the view that it would be useful to request Governments to provide the Commission with the most significant national legislation, decisions by domestic courts and State practice relevant to diplomatic protection.

49. Lastly, with regard to the seventh conclusion, Mali approved of the Commission's decision at its forty-ninth session, in 1997, to complete the first reading of the topic by the end of the current quinquennium.

50. On the topic of "Reservations to treaties", Mali's position on the Commission's invitation contained in paragraph 41 of its report was that unilateral statements by which a State purported to increase its commitments or its rights in the context of a treaty beyond those stipulated by the treaty itself should not be considered as reservations. A reservation in the form of a unilateral statement could and should have but a single purpose, namely, to exclude or modify the legal effect of certain provisions of the treaty as they applied to the State that made the reservation.

51. With regard to paragraph 42, it was essential for Governments to provide information or materials relating to State practice on such unilateral statements and Mali would make its contribution in a timely manner.

52. **Mr. Lavalle Valdes** (Guatemala) observed that the revised text of the 17 draft articles on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) omitted all the provisions relating to liability included in the original 22 draft articles contained in annex I to the Commission's report on its forty-eighth session (A/51/10). The revised text had thus focused exclusively on the regime of prevention and had omitted those provisions of the original text that related to liability and to the nature and extent of compensation or other relief. The intention of the authors was clearly to deal with the phases prior to the phase in which the harm occurred, during which the liability of the State of origin might be engaged. Article 16 of the revised text, for example, referred to "persons ... who may be or are exposed to the risk of significant transboundary harm", instead of to "persons who have suffered significant transboundary harm", as article 20 of the original draft articles had done.

53. In Guatemala's view, however, it was not possible to prevent the question of liability from being reintroduced into

the revised draft articles. The latter imposed on States obligations whose main purpose was to prevent transboundary harm. Clearly, however, a State bound by the text of the revised draft articles could cause transboundary harm to another State as a consequence of its failure to fulfil those obligations, thereby incurring responsibility towards the affected State. That responsibility, however, was different from the liability to which the original text referred in that the State of origin committed not an act not prohibited by international law but rather an act prohibited by international law.

54. His observations were borne out by the commentary to article 3 of the revised text, which stated that the obligation of States to take preventive or minimization measures was one of due diligence and that the obligation imposed by article 3 was not an obligation of result. There was thus an evident need for primary and secondary rules, an essential attribute of State responsibility.

55. His delegation believed that, under the original draft, in cases where a State bound by the provisions of the draft text caused harm to another State, it incurred liability, even if it had complied with its obligations of prevention. If, however, it had failed to comply with those obligations, and if that non-compliance was the cause of the harm suffered by the other State, it would be held not liable but responsible. That was clear from the fact that in annex I to the Commission's report on the work of its forty-eighth session (A/51/10) paragraph (4) of the commentary to article 4 in the original draft was identical with paragraph (6) of the commentary to article 3 of the revised draft. It would therefore seem that under the original draft a State could be both liable and responsible: the former if it harmed another State despite complying with its obligations of prevention, the latter if it had failed to comply and the harm was due exclusively to that non-compliance.

56. The Commission had not explained why it had decided to delete the words in square brackets appearing in article 1 of the original draft. His delegation would suggest that in article 2 (a) of the revised draft the words "a low probability ... other significant harm" should be replaced by the words "any risk within a range extending from a high probability of causing significant harm to a low probability of causing disastrous harm". If that suggestion was unacceptable, an alternative would be to replace the word "and" with "or" and delete the word "other". If the second suggestion was acceptable, the following words could be added at the end of draft article 2 (a): "and any risk lying between those two extremes". His delegation welcomed the new draft article 2 (b) and the deletion of article 3 of the original draft, which, as it had previously argued, was unnecessary. It queried,

however, whether article 5 of the revised draft served any useful purpose: it had no equivalent in the original draft.

57. With regard to article 16 of the revised draft, it was strange that in discussing access to judicial or other procedures to seek redress, the text referred not to persons who had been harmed but to persons "exposed to the risk" of harm. Doubtless the authors of the revised draft had wished to remove any allusion to questions of responsibility, but, as he had pointed out, the revised draft already incorporated the concept of responsibility. The words "who may be or are exposed to the risk of" should therefore be replaced by the words "who have suffered, as a result of non-compliance with the duty of prevention,". Article 17 of the revised draft was unsatisfactory, since, as paragraph 1 of the draft article indicated, there might be disagreement not only over facts but also over interpretation.

58. Lastly, it should be asked whether the revised draft could stand on its own. The answer was that it could, but only in the sense that a person could survive the amputation of a leg. In his delegation's view, the amputated parts should be reincorporated into the revised draft; in other words there should be a return to the original draft. Alternatively, the amputated parts could form a protocol to the treaty that the revised draft would become.

59. **Mr. Manongi** (United Republic of Tanzania) said, with regard to international liability for injurious consequences arising out of acts not prohibited by international law, that the Commission had made a bold move in deciding to recommend a specific regime on prevention distinct from a regime of liability, raising the question whether the duty of prevention should continue to be treated merely as an obligation of conduct and not of result or whether failure to comply should be subjected to suitable consequences under the law of State responsibility or civil liability or both where the State of origin and the operator were both involved. The decision was bold because the distinction remained confusing. Prevention was, of course, better than cure, but liability had a dual significance – prevention and reparation – just as, in criminal law, the law had both a preventive and a punitive function. In both instances, prevention was only a cautionary obligation of conduct, with no consequential effect in itself, until and unless conduct resulted in an undesirable effect or fault. The establishment of a separate regime based solely on the obligation to prevent would give rise to presumed liability with consequences even when no effect had occurred. If prevention was better than cure, it was hard to understand how failure to perform a duty that had not resulted in an effect could give rise to an actionable cause. The consequence might be that States would not wait until harm occurred in order to invoke liability in the case of a State which seemingly failed

to control or to impose certain standards. Such a course of action was fraught with subjective influences and was therefore worrying.

60. Although the International Court of Justice had stated that the obligation of States to ensure that activities within their jurisdiction and control respected the environment of other States or of areas beyond national control had become part of the corpus of international law relating to environment, it remained doubtful whether the notion of strict liability or the exclusion of fault by concentrating on result alone was just, when applied strictly on the regime of State liability. One of the consequences of globalization and liberalization was that in many cases the activity causing harm could be attributed to a private person and not to the State. It might therefore be appropriate to assign the State a secondary, not a primary, liability. The activities of the primary actors should not escape attention; the person responsible for pollution or harm should bear direct and consequential costs, as required by a number of international instruments.

61. His delegation commended the Commission on the sense of fairness that had gone into the formulation of draft article 12 on factors involved in an equitable balance of interests, and notably subparagraph (a). It was too often forgotten that, because of underdevelopment, such factors as low standards of technology or the financial inability to acquire the latest technology which might enhance a State's preventive capacity had to be taken into account if international environmental law was to reflect the existing range of interests.

62. Lastly, it was a matter of relief that the Commission had sought to adopt a title more compatible with the substance of the draft articles. Given its views, his delegation would prefer the draft articles to take the form of a model law rather than a convention. By the same token, it would prefer to see a voluntary dispute settlement regime *inter partes*.

63. **Mr. Cafilich** (Observer for Switzerland) said that the draft article on international liability for injurious consequences arising out of acts not prohibited by international law were of considerable interest, since they put a new slant on the topic, namely the prevention of transboundary harm resulting from activities that might be legal but were hazardous. The work of the Commission had doubtless been facilitated by the adoption of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, several of whose provisions had contributed much to the draft articles. The approach adopted – the insistence on a duty of prevention based on the rule of due diligence – seemed satisfactory, although his

Government had not yet had the opportunity to study the draft in depth.

64. Draft article 1 stated that the text applied to activities which involved "a risk of causing significant transboundary harm", yet draft article 2 (b), (c) and (d) made it clear that the risk referred to was that of harm to another State. It would surely be appropriate to include a reference, such as that contained in articles 20 and 22 of the aforementioned 1997 Convention, to the risk of causing significant harm to an ecosystem. In respect of draft article 2, he drew attention to the confusion surrounding the word "significant". Paragraphs (4)–(7) of the commentary to draft article 2, after asserting that a determination regarding the word had to be made in each specific case, stated that "serious" or "substantial" had on occasion been used synonymously with "significant", even though earlier it had been stated that "significant" need not be synonymous with the other two words. It could not but be recalled that the debate on the term in the Working Group of the Whole for the Elaboration of the 1997 Convention had come up with a definition that was difficult to use. Hard though it might be to resolve the problem of definition, the scope of application of the obligation of prevention depended on its being resolved and the Commission should take another look at the matter.

65. Draft article 3 referred to "appropriate measures", and paragraph (6) of the commentary made it clear that the obligation to apply such measures was one of "due diligence", yet the latter concept was not fully broached until draft article 5, and rounded out in draft articles 7, 8 and 10–13. His delegation wondered whether the concept of "due diligence" should not rather be explicitly mentioned in draft article 3.

66. The system proposed in draft articles 7 and 8 and 10–13, embodying a relatively broad duty of notification counterbalanced by the fact that the obligation to prevent was not absolute but conditioned by the equitable balance referred to in draft article 12, seemed admirable. Such a mechanism, and the specific provisions relative to it, were largely acceptable to his delegation, but with two reservations. First, the reference to a "reasonable time" in article 10, paragraph 2, was too imprecise and should be replaced by a specific period of time; and, second, activities that risked harming the environment should not be merely one of the factors involved in an equitable balance of interests but should perhaps be simply forbidden.

67. With regard to paragraphs 31–34 of the report, his delegation had not yet determined its position on the question whether lack of due diligence would give rise to liability in the absence of any damage actually occurring. If damage did occur, however, the State was responsible; in other words,

there remained an obligation of conduct, to which could be added the civil obligation of the exploiter. Lastly, draft article 17 – which was similar to article 33 of the 1997 Convention – was inadequate. If a dispute could not be settled by means of a fact-finding commission, a State party should be entitled to embark on a judicial procedure leading to a binding decision.

68. With regard to diplomatic protection, the Commission had made relatively little progress. Some confusion persisted regarding the distinction between the (secondary) material rules concerning the elements of international responsibility and the secondary procedural rules on the conditions for the exercise of diplomatic protection. His Government believed that the two categories should be distinguished as clearly as possible. It was true that part of the doctrine tended to view diplomatic protection as a mechanism allowing the State to act as an agent of its national who had a legally protected interest (para. 68). That, however, was hardly the approach adopted by chanceries in their everyday work. The Working Group had therefore been right to conclude that the "customary law approach to diplomatic protection" should form the basis for the Commission's work. Diplomatic protection was and should remain a right of the State, with all the consequences that that entailed. The difficult but interesting issue of the relationship between diplomatic protection and international human rights protection, raised in paragraphs 83–91, should be seen in that light. The exercise of diplomatic protection would thus remain a right of the State, whereas international human rights protection systems served individual rights. The two mechanisms should remain separate, even if their aims partially overlapped. The Commission should focus on diplomatic protection and should not prejudice questions relating to international human rights protection; for example, it should avoid the question whether the exhaustion of local remedies included the opportunities offered by international human rights protection systems.

69. The Commission had decided to tackle the whole question of diplomatic protection, including the protection of companies or associations as well as persons. His delegation had already drawn attention to the dangers in that approach, since codification would be difficult. It would have preferred that aspect of the matter to be avoided, but the Commission seemed not to share that preference. It would, nonetheless, be prudent to limit the first part of the Commission's work to the general aspects of the issue and the protection of physical persons, where codification would not be too difficult. The protection of companies or associations could be tackled later on. That approach would have the advantage of ensuring that rules relating to physical persons could be codified unhampered by disputes over protection for

companies and associations, which might hold up all the work relating to diplomatic protection.

Agenda item 154: Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization
(continued) (A/C.6/53/L.2)

Draft decision on the report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization (A/C.6/53/L.2)

70. **The Chairman** said he took it that the Committee wished to adopt draft decision A/C.6/53/L.2.

71. *It was so decided.*

The meeting rose at 12.10 p.m.



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Held at Headquarters, New York, on Tuesday, 27 October 1998, at noon.

Chairman: Mr. Mochochoko (Lesotho)

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Agenda item 150: Report of the International Law Commission on the work of its
fiftieth session (*continued*)

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98-81931 (E)



The meeting was called to order at 12.10 p.m.

Agenda item 150: Report of the International Law Commission on the work of its fiftieth session
(continued) (A/53/10)

1. **Mr. Longva** (Norway), speaking on behalf of the Nordic countries, said that those countries agreed with the Commission that diplomatic protection was a topic of great practical significance which was ripe for codification and on which there was already a sound body of legislation. The rules of diplomatic protection were closely related to those governing both relations between States and traditional public international law; they clarified the division of competence between States and helped to ensure respect for international law as it related to the protection of foreign nationals in a host State, without prejudice to any other relevant legislation.
2. Diplomatic protection was a sovereign prerogative of the State of nationality of the person concerned and, as such, provided for discretionary State powers. For all practical purposes, the person concerned was to be considered as a beneficiary of international law, without regard to theoretical assessments of whether or to what extent that person was a subject of international law. While diplomatic protection could not be assimilated to human rights, the two approaches might overlap in some cases. It was important to focus on practical rather than theoretical issues, and the Nordic countries hoped that the end result would serve as a guide to practitioners and would cover not only the issues indicated by the Commission, but also questions related to dual nationality, *inter alia*, with regard to the abduction of children, and the diplomatic protection of legal persons. He also stressed the importance of consular functions as distinct from diplomatic protection, although those institutions could play complementary and even overlapping roles.
3. With respect to nationality in relation to the succession of States, the Nordic countries shared the Commission's hesitation as to the possibility of extending the topic beyond the context of State succession, noting that the overlap with the question of diplomatic protection would be considerable. On the other hand, a more limited study would be warranted only if it addressed practical problems faced by States. The future of the topic therefore rested in the hands of Governments in a position to share their practical experience of State succession as it affected the nationality or status of legal persons; in the absence of comments in that regard, the Commission might do better to turn its attention to other issues.
4. **Sir Franklin Berman** (United Kingdom) said that in celebration of the Commission's fiftieth anniversary, the United Kingdom had hosted a two-day discussion between several members of the Commission and a group of British experts on international law, focusing on the role and agenda of the Commission. In that regard, he drew attention to a recent study of the Commission's future work published by the British Institute of International and Comparative Law.
5. The Commission was the sole body of its kind and the only one capable of taking a comprehensive view of the international legal system. While nominated by Governments and elected by the General Assembly, its members served in a personal capacity, thus retaining an element of independence which was a defining characteristic of the Commission. Moreover, more recently established international lawmaking bodies were typically composed of specialists in specific fields, some of whom were not experts in international law. The relationship between the Commission and the Committee, which represented the Governments of Members States, was therefore fundamental to the future work of the Commission.
6. He thanked the Secretariat for making available at an early stage the sections of the report summarizing the work of the Commission's 1998 session and listing points on which States were requested to comment. Although his own Government had been unable to prepare adequate replies in the absence of the sections of the report to which the requests related, the new procedure was worthwhile and he hoped that it would be improved on. He also considered that the decision to divide the Commission's session into two parts deserved further trial and that it might be useful to continue to hold one part of the session in Geneva and the other in New York as had been done in 1998.
7. The Commission's new approach to the prevention of transboundary damage had been a success, as shown by the adoption of a set of 17 draft articles with commentaries. In light of those articles, he suggested that the instrument's title should be changed in order to emphasize the underlying notion of environmental damage inherent in the reference to harm caused through physical consequences. Furthermore, while he agreed that the duty of prevention was an obligation of conduct, it was important to remember that within the normal framework of State responsibility, consequences could nevertheless stem from the breach of such an obligation. In that regard, as with the topic as a whole, he thought that the draft articles should be practical rather than theoretical in nature.
8. On the topic of diplomatic protection, his delegation was perplexed or even disappointed. The idea put forward

by the Special Rapporteur that diplomatic protection should be recognized not as an inter-State institution of international law but as an arrangement under which the State acted as agent for its injured national would not be codification at all but a radical reformulation and it was hard to see what benefit would flow from it. On that subject, his delegation endorsed the remarks made by the representative of Switzerland and by the representative of Norway, speaking on behalf of the Nordic countries. The Commission should pursue the seven points agreed by the Working Group as listed in paragraph 108 of the Commission's report.

9. On the subject of unilateral acts of States, his delegation was rather more hesitant at the current stage than it had been at the outset. The preliminary report and its discussion in the Commission appeared to leave the topic at once both too narrow and too broad. His delegation would encourage the Commission to focus its preliminary studies far more closely on the main practical problems that needed to be examined. Without that as a basis for future decisions, it was doubtful whether the Sixth Committee would be in a position to decide whether detailed work on the topic would be well-founded or feasible.

10. The Commission had approached its second reading of the draft articles on State responsibility with both intellectual rigour and an appreciation of the practical context within which the rules of responsibility actually operated and the constraints of the timetable.

11. The informed debate on the subject of State "crimes" made especially interesting reading. The Commission had asked, in paragraph 35 of the report, whether all conduct of an organ of a State was attributable to that State under article 5 of the draft articles, irrespective of the *jure gestionis* or *jure imperii* nature of the conduct. In the view of his delegation, the short answer to that was "yes". The question whether acts were attributable to the State was independent of the question of the nature of those acts. All acts of an organ of the State, when acting officially, were attributable to the State. There was no relationship, as the terms used in the question might suggest, between whether an act was attributable to a State and whether the State enjoyed immunity from the jurisdiction of foreign courts.

12. The Commission had also asked, in paragraph 36, about the appropriate balance to be struck in Part Two of the draft articles between the elaboration of general principles and of more detailed provisions. In the view of his delegation, the approach in the current draft was prone to weaknesses of both excessive generality and misplaced specificity. For example, draft article 42, paragraph 2, specified that reparation was to be determined having regard

to "the negligence or the wilful act or omission" of the injured State or its national. Other factors, such as the nature of the rule violated or the wilfulness of the injuring State, were not mentioned. It would be preferable either to eliminate such selective specificity or to offer a more comprehensive draft.

13. From the point of view of clarity of the law, detailed regulations might be preferable. However, detailed and comprehensive consideration of the law on separation, compensation and so on would take a considerable time and would delay the completion of the Commission's work on State responsibility. Those topics would, moreover, lend themselves to a separate study, firmly rooted in the examination of State practice. If that approach was taken, it would be necessary to ensure that the provisions in the draft articles on State responsibility did not prejudice the results of any further study of the topics. Those questions of detail versus generality were linked to the question of the final form of the draft, which the Commission still had under consideration.

14. Turning to the question of nationality in relation to the succession of States, he said that his delegation shared the scepticism about the need to confront the nationality of legal persons in that context. The final views of his Government would, of course, be influenced by those of Governments which had undergone a recent succession of States and its consequences.

15. The work of the Commission on the topic of reservations to treaties could serve the real and pressing needs of Governments in their daily business, and could do so even without an exercise in formal codification. His delegation had some reservations, however, about the definitional exercise on which the Commission seemed to have embarked. The definitional exercise contained the hidden trap of presuming that because something had been defined, therefore it existed in a legally relevant sense. Some caution might be due, for example, as to whether so-called "interpretative declarations" were really a separate legal category or just a convenient portmanteau reference for statements that did not amount to reservations. There was also a question as to how far solving the conundrum of whether "interpretative declarations" had legal effect of any kind (and if so, what) was a necessary part, or at least a priority part, of what the General Assembly had asked the Commission to do. The exercise did seem to have flushed out one or two points of importance, but they were points of legal substance, not of pure definition.

16. **Mr. Yamada** (Japan) said that the Commission's experiment with a split session had been a success, as shown

by the fact that the Commission had completed both a set of 17 draft articles on prevention of transboundary damage from hazardous activities and draft guidelines on reservations to treaties. He suggested that in future, the Commission should hold 10 rather than 8 meetings per week, as it had in New York, thereby shortening the total length of its sessions by one week for every six. It had also been useful for the legal advisers of New York Missions to observe the Commission's work and meet its members. It was regrettable that financial constraints made it impossible for the Commission to continue to meet in split session, and he hoped that the budget for the next biennium would provide funding for it to resume that practice.

17. The fact that the Commission had been able to complete the draft articles on prevention of transboundary damage from hazardous activities in only one year validated its decision to pursue the issue of protection in preference to the broader topic of international liability. Generally speaking, his delegation approved of the draft articles, and he urged the Committee to ask Governments to submit their comments expeditiously so that the Commission could complete its second reading of the draft by the end of the current quinquennium.

18. In reply to the questions raised by the Commission in chapter III (c) of the report (A/53/10), he said that, irrespective of whether States fulfilled their obligation of prevention, the nature of the activities involved would always entail the possibility of significant transboundary harm. Accordingly, the obligation of prevention was one of conduct, not of result, and failure to comply with that obligation fell into the realm of State responsibility. A distinction must be made between international liability for significant transboundary harm and State responsibility, although in some cases such harm could be partially attributed to failure to comply with the obligation of prevention.

19. The role of dispute settlements depended on the form which the draft articles would ultimately take. While his delegation had no firm views on the matter, it considered that a framework convention might be most appropriate; in that case, the Convention on the Law of the Non-navigational Uses of International Watercourses offered appropriate dispute settlement procedures. Because liability would require a separate regime for each category of hazardous activity, residual rules would be of little use. Furthermore, it would be premature to embark on identification of activities which caused significant harm without a precise definition of the scope and content of the final instrument. Further consideration of that topic should be postponed until the Commission had considered the issues

relating to international environmental law mentioned in paragraph 43 of the report.

20. With regard to diplomatic protection, he said that the legal personality of individuals under international law, though limited, had been gradually recognized, particularly in the case of the consideration of individual complaints by international human rights treaty bodies. He commended the Special Rapporteur for striking a balance between the traditional institution of diplomatic protection and recent developments in international law regarding the legal status of individuals. However, his delegation was not in favour of deviating from the basic principle of diplomatic protection embodied in the *Mavrommatis Palestine Concessions* case, in which the Permanent Court of International Justice had stated that "once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant". He doubted that States would recognize that, under general international law, an individual would have such legal personality as to lodge a claim directly against a foreign State through international dispute settlement procedures. Furthermore, some issues related to diplomatic protection, such as the exhaustion of local remedies, must also be examined from the point of view of State responsibility. Lastly, his delegation considered that it was important to avoid abstract discussion of the distinction between "primary" and "secondary" rules, although it favoured a focus on the latter.

21. **Mr. Orrego Vicuña** (Chile), referring to chapter IV of the report, said that the focus on prevention in the draft articles was correct. That was undoubtedly the proper way to address issues relating to environmental law. It was obvious, however, that the focus on prevention did not preclude liability in cases where prevention was not carried out. There was a clear link between the topic and other well-established principles of international law, such as the "polluter-pays" principle and the principles of intergenerational equity and shared but separate liability. Similarly, the approach taken in article 1 of stating only that the draft articles applied to activities not prohibited by international law, without listing them in detail, was also highly appropriate and reflected the approach taken in domestic law.

22. The scope of the draft was limited to transboundary damage caused in another State; it was understood that the affected State could take action to enforce international liability for the failure to take preventive measures. It was clear, however, that the type of damage involved usually affected common spaces, as in the case of marine and atmospheric pollution. His delegation proposed that the Commission should explore the feasibility of an entity or

institution being empowered to act on behalf of the international community in the event of damage to common spaces, perhaps through the establishment of a high commissioner on the environment, as had been suggested. The observer for Switzerland had raised an interesting notion in that connection by referring at a previous meeting to the concept of damage to ecosystems.

23. The draft referred to the concept of "significant harm", which was often used to establish a threshold beyond which damage was deemed to have occurred. At the same time, however, it could also serve as a threshold for the extinction of liability when the damage in question fell below a certain level. In that case, the burden of proof fell on the party invoking the extinction, not on the victim of the damage. That was important, because one of the major efforts being made in the field of environmental law was to reverse the burden of proof so that it fell on the alleged perpetrator, not on the alleged victim.

24. The "due diligence" criterion was interesting in that it diverged from a subjective approach and implied a degree of objective assessment. Many internationally accepted principles and standards, such as those contained in the International Maritime Organization conventions, constituted a form of international codification of the due diligence principle, which pointed towards forms of objective or strict liability.

25. While the draft referred to the need to involve the operator of the activity, it did so indirectly, for example, in relation to the costs of prevention (para. (16) of the Commission's commentary to draft article 3). It was important, however, that the operator should be linked more directly to a liability regime, together with the State, insurance carriers, special funds, and so on.

26. While the notion of prior authorization was certainly important, it should be borne in mind that only certain types of activity were subject to an environmental impact assessment under domestic law; for that reason, the criteria should be narrowed to some extent. His delegation noted with concern that prior authorization was also required for pre-existing activities; that could give rise to major problems with regard to acquired rights and foreign investment, possibly even leading to international claims.

27. His delegation noted with satisfaction the provisions in the draft articles relating to impact assessment procedures, information and consultations and, in particular, individual access to the courts in accordance with the principle of non-discrimination.

28. Lastly, his delegation suggested that the notion of prevention should be linked to the obligations of response action and rehabilitation, which should also apply to the operator of the activity. Failure to comply with those obligations could give rise to international liability regardless of the damage caused. At the same time, the impact of the damage should be taken into account in assessing the liability incurred. To that end, the Special Rapporteur should in the future examine ways of assessing environmental impact.

29. Turning to chapter V of the report, he said that the Special Rapporteur had correctly identified one of the major issues relating to the topic, namely, whether the rights involved in diplomatic protection belonged to the State or to the individual. While it was clear that the right to invoke diplomatic protection belonged to the State, the right itself, as suggested in the Special Rapporteur's report, belonged to the individual. As views on that subject had evolved a great deal over the past 30 or 40 years, his delegation believed that the question should be considered not only from the standpoint of customary law, but also in the light of current practice.

30. It was also necessary to examine the consequences of that shift in perspective for individual rights. Three such consequences could already be observed: first, presentation of a claim of diplomatic protection was not always left to the discretion of the State; in many cases, there was an element of compulsion; second, distribution of the compensation obtained was not always left to the discretion of the State; and third, the damage invoked in claims presented by the State did not always differ from the damage sustained by the individual. The shift in perspective was evident, for example, in bilateral investment protection treaties and the International Centre for Settlement of Investment Disputes (ICSID) Convention. In current practice, the State most often acted as the agent of the individual in providing a channel for an international claim where no direct channel existed.

31. Other specific problems arose in the area of nationality. Claims were not always presented on behalf of nationals; in many cases, they were presented on behalf of non-nationals and even of nationals of the wrongdoing State. That could be seen, for example, in the practice of the United Nations Compensation Commission. There were no longer any firm requirements with respect to continuity of nationality in the context of diplomatic protection; cases involving dual nationality were leading to a much more flexible criterion. Another very important question concerned the protection of corporations and shareholders. International practice showed that the criterion applied in

the *Barcelona Traction* case, which prohibited action by individual shareholders, no longer prevailed.

32. **Mr. Abraham** (France) said that his remarks would focus on the topic of diplomatic protection. He noted that for the Special Rapporteur, the main question was who held the right exercised by way of diplomatic protection – the State of nationality or the injured victims. In the view of his delegation, the traditional conception of diplomatic protection – that the State, by taking up the case of one of its subjects, was asserting its own right – should be retained. The question whether the State that exercised diplomatic protection was protecting its own right or that of its injured national was a rather theoretical one, and might not be useful to the debate.

33. The exercise of diplomatic protection was a right of the State. To assert that right in a given case, the State took into account not only the interest of its national who had suffered injury because of a wrongful act of another State, but also a number of issues related to the conduct of its foreign policy. The exercise of diplomatic protection should be at the discretion of the State.

34. He had some doubts about the Commission's insistence on establishing a relationship between human rights and diplomatic protection. The Commission's work should not entail the assimilation of the two institutions or the establishment of a hierarchy between them. He questioned the usefulness of including the "human rights approach" in the study. The same criticism could also be made with regard to the draft articles on the nationality of natural persons in relation to the succession of States. That was not to say, of course, that the Commission should not study the rights covered by diplomatic protection, including human rights.

35. His delegation noted with satisfaction that the Commission had decided to confine its study to the codification of secondary rules, which were procedural in nature. In fact, his Government had serious reservations regarding the articles on State responsibility precisely because the Commission had not limited its study to the secondary rules. The Commission should establish as a precondition the existence of a wrongful act of the State, but its study should not extend to the content of the international obligation that had been breached.

36. The Commission should pay special attention to the rules on admissibility of claims and the prior conditions which had to be satisfied before claims were made. The Commission should not attempt to define the relationship between the nationality of natural or legal persons and the conditions under which such nationality had been granted.

The Commission should not consider the question whether the individual had respected the law of the State in whose territory he or she was. It would be useful to stress the conditions under which the individual's behaviour might exempt the host State from responsibility.

37. The Commission should consider preconditions for the exercise of diplomatic protection. The first precondition would not appear to present any particular problem. There must be proof that an injury had been inflicted on a national, that the injury was a breach of international law, that it must be imputable to a State, and that a causal link existed between the wrongful act of the State and the injury. The second precondition was somewhat more complex, i.e., that injured subjects must have been unable to obtain satisfaction through domestic remedies. The second precondition should be studied in the light of the development of international law and the options available to individuals who had suffered injury. The Commission should address the question as to whether the resort to an international body to protect human rights must be considered a "local remedy", even though a simple textual interpretation could not answer the question in the affirmative.

38. The mechanism of diplomatic protection had been extended by analogy to claims brought by international organizations on behalf of their agents. That protection was comparable to the protection which States exercised on behalf of their nationals, and the Commission should include it in its study.

39. **Mr. Yin Yubiao** (China), referring to chapter IV of the report, said that prevention was an important aspect of the issues relating to transboundary damage. In order to protect the environment effectively, it was necessary to focus on preventive measures. Principle 2 of the Rio Declaration on Environment and Development stipulated that States must ensure that activities within their jurisdiction or control did not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. The principle of prevention had become an integral part of international environmental law; accordingly, the adoption of a set of articles on the subject was in conformity with current trends.

40. His delegation endorsed the concept that the draft articles should apply only to activities which involved the risk of causing significant transboundary damage. In other words, prevention should not cover any legal activities which did not involve such a risk, even though they might actually have caused significant transboundary damage. Damage caused to the global commons did not fall within the scope of the topic. His delegation had no objections to the provisions on prior authorization, notification and

information, exchange of information and factors involved in an equitable balance of interests, which were the result of extensive prior discussion.

41. Further consideration should, however, be given to former article 3 on freedom of action and the limits thereto, as contained in the original draft submitted by the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law (A/50/10, annex I). The original article stipulated that the freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction or control was not unlimited and was subject to the general obligation to prevent or minimize the risk of causing significant transboundary harm. While the article did not require States to guarantee that they would not cause transboundary damage, it did require them to adopt all necessary measures to prevent or reduce such damage. Accordingly, the draft article was highly meaningful and should be the basis for other articles relating to the topic.

42. Another drawback of several of the draft articles was the absence of provisions embodying the need to pay due attention to the special conditions of the developing world. Economic development was the top priority for developing countries. The pursuit of environmental goals placed an enormous and sometimes unbearable burden on their economic development. The well-being of current and future generations, and domestic and international interests, should be taken into account in the provisions dealing with environmental protection and resource development. In that context, global partnership should be promoted to enable the developing countries to fulfil their obligation to prevent transboundary damage both for their own benefit and for the common good. To that end, it was necessary to promote technology transfers on equitable terms, develop a common fund for financial support and provide training and technical cooperation. While both the current and the previous Rapporteur had raised the point of enhancing the technological capacity of the developing countries, it was not reflected in the current draft articles. It was to be hoped that the Commission would improve the text on second reading by implementing the principles set forth in article 6 of the Rio Declaration.

43. As the duty of prevention was treated as an obligation of conduct, failure to comply without causing any damage would not entail liability. If, however, damage had been caused, either State responsibility or civil liability, or both, were involved and must be brought to bear on the State of origin and on the operator. On the other hand, if damage had been caused despite compliance, the operator must bear the liability. Since the Commission had decided to separate the

prevention regime from the damage liability regime as an independent system without specifying the connection between the two, as indicated in the original topic, it remained unclear how liability for damage should be addressed after consideration of the draft articles on prevention had been completed.

44. **Mr. Andrews** (United States of America), referring to the Commission's work on international liability for injurious consequences, noted with satisfaction that the Commission had rapidly developed and approved on first reading a set of 17 articles on preventing transboundary damage from hazardous activities, which drew significantly on the new United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses. His delegation welcomed the Commission's initiative in redirecting its work to focus on avoiding transboundary harm. It must be recognized, however, that the draft articles seemed to be premised upon a highly centralized State with comprehensive regulatory powers. It would be difficult or even impossible to implement those principles effectively in federal States like the United States, where regulatory authority was shared.

45. The avoidance of transboundary harm was a difficult topic. In addition to problems of implementation posed by differences in the structures of States, it was hard to strike the correct balance between the rights of States of origin and of States affected by transboundary harm. His delegation was not initially persuaded that the new draft articles always struck the correct balance.

46. His delegation appreciated the efforts made by the Working Group to establish an approach to the topic of diplomatic protection. For both States concerned in cases where diplomatic protection was invoked, the institution could provide an effective, generally understood mechanism for clarifying and enhancing compliance with international law.

47. He hoped the Commission would not take too narrow a view of its future work on unilateral acts of States. While it could be useful to consider the legal effects of declarations and other formal statements intended to have legal consequences, problems could arise precisely because it was not always clear whether particular words or actions were intended to have such consequences. His delegation urged the Commission to broaden the scope of its work and not to confine itself to unilateral statements clearly intended to have legal effects.

48. His delegation did not think that the Commission's future work should extend to the unilateral acts of international organizations, which did not seem to be an

issue of practical consequence. If the unilateral acts of international organizations were included, their treatment should be limited in scope.

49. The issue of State responsibility was the most important and difficult topic on the Commission's agenda. His delegation was pleased that the Commission had adopted several of the Special Rapporteur's recommendations to clarify and simplify the draft articles, including the deletion of several unnecessary provisions. It endorsed the changes made to the texts of articles 4 and 5 to underscore that international law governed in the event of any conflict with internal law, and supported the Special Rapporteur's wish to give further study to reparations, including the important matter of interest.

50. His delegation did not believe that the notion of "crimes" should be included in article 19, inasmuch as that concept did not have a basis in State practice or judicial decisions. It did not belong in the law of State responsibility. When the Commission reverted to article 19, it should delete the concept of crimes.

51. Regarding nationality and succession of States, it was clear to his delegation that expanding the Commission's current work to add a comprehensive general study of legal persons in cases of succession would be useful.

52. Regarding reservations to treaties, his delegation appreciated the work of the Special Rapporteur and shared the Commission's overall view that the Vienna Convention on the Law of Treaties created a workable general regime for reservations applicable to all types of treaties. The Vienna regime did not require major revision; hence, the Commission's work should focus on filling in gaps and areas of possible ambiguity. The portions of the Commission's new guidelines containing the definition of reservations and interpretative declarations set out in paragraph 540 of the report seemed sound and useful.

53. With regard to the Commission's proposed topics for its future long-term work programme, his delegation was pleased to see that each of the topics proposed seemed clear and discrete. They should be easily completed with a few years' focused work.

The meeting rose at 1.30 p.m.



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Held at Headquarters, New York, on Wednesday, 28 October 1998, at 10 a.m.

Chairman: Mr. Enkhsaikhan (Mongolia)
later: Mr. Mochochoko (Vice-Chairman) (Lesotho)
later: Mr. Enkhsaikhan (Chairman) (Mongolia)

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Visit by the President, Vice-President and Registrar of the International Court of Justice

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fiftieth session (*continued*)

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The meeting was called to order at 10.15 a.m.

Visit by the President, Vice-President and Registrar of the International Court of Justice

1. **The Chairman** welcomed to the Committee the President of the International Court of Justice, Mr. Stephen Schwebel, the Vice-President of the Court, Mr. Christopher Weeramantry, and the Registrar of the Court, Mr. Eduardo Valencia-Ospina. He then invited the President of the Court to address the Committee.

2. **Mr. Schwebel** (President of the International Court of Justice) said that he regarded the members of the International Law Commission and the Sixth Committee as workers and colleagues in the same field who were devoted to nurturing the progressive development and increased effectiveness of international law. He therefore expressed his gratitude for the privilege of seeing them at work.

3. **The Chairman** said that he looked forward to future visits to the Committee by the President of the International Court of Justice and to further contacts between the Committee and the Court.

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(*continued*) (A/53/10 and Corr.1)

4. **Mr. Cede** (Austria) endorsed the decision by the International Law Commission to hold a single session in Geneva in 1999 and another split session in 2000. Such an arrangement would make it easier for the Commission to evaluate which schedule was more conducive to the progress of its work.

5. With regard to chapter IV, his delegation was gratified that the decision taken the previous year to undertake the study of prevention should have already resulted in a set of draft articles. Its pleasure at such speedy action was, however, mixed with concern over what it perceived as basic shortcomings in the draft articles and the commentary. First, it could be questioned whether the Commission was right in choosing the wording "risk of causing significant transboundary harm" instead of "significant risk of transboundary harm" as one of the three defining criteria. The wording chosen unnecessarily blurred the exact legal interrelationship of the crucial elements of the risk, probability and consequence of the injurious event. Second, the related assumption in paragraph (13) of the commentary to draft article 1 that the core concern of the prevention topic was future harm as against present, or ongoing, harm, was not fully convincing and reflected a basic conceptual

weakness in the Commission's approach. The proper distinction was rather between events that were certain and those that were less than certain, and possibly quite improbable. Third, the suggestion was that a State's obligation to prevent "significant transboundary harm" that was bound to occur might be discharged by the State's taking measures to prevent or minimize the risk of such harm. The assumption that State conduct involving the risk of inevitable significant transboundary harm did not, as such, also entail that State's obligation to cease and desist from the risk-bearing conduct was highly questionable; it reflected an anachronistic view of the fundamental balance of States' rights and obligations in situations in which a significant degradation of the environment was involved.

6. With regard to the specific questions posed in paragraphs 32-34 of the report, his delegation believed that failure to comply with any of the duties of prevention as set out in the draft articles would be covered by the law of State responsibility. Since all such duties had thus far been couched in terms of obligations upon States, there was no need for the Commission to address issues relating to the civil liability of the private operator involved in any given context. As for the eventual form that the draft articles might take, it would be premature to give an answer; his delegation would wait and see how the Commission proceeded in redressing some of the fundamental problems that he had identified. With regard to the form that the dispute settlement procedure should take, it would make sense to follow the example of the Convention on the Law of the Non-Navigational Uses of International Watercourses, given the very similar level of complexity of the interrelated rights and obligations of States. The Commission could readily adapt the provisions of article 33 of the Convention and the annex on arbitration to the draft articles on prevention. His delegation continued to support the Commission's decision to concentrate, as a first step, on the topic of prevention. The concerns that he had expressed should not be seen as a criticism of the Commission's work but only as ideas and suggestions that should be taken into account in future deliberations.

7. The Commission should not lose sight of the originally conceived task of elaborating rules on liability proper. Meanwhile, its work on prevention could and should make a useful contribution to clarifying and strengthening international law in support of sustainable development.

8. With regard to diplomatic protection (chapter V), it was regrettable that it had not yet been possible to produce draft articles that could provide a focus for the Commission's future debates. If the Commission intended to abide by its own schedule of work, it should consider

specific, more narrowly defined issues rather than engaging in yet another round of general discussions.

9. Human rights and diplomatic protection should not be specifically linked in any draft articles on the topic. The international norms governing the two had overlapping, but intrinsically different, public order functions. In particular, his delegation seriously doubted that the perspective of diplomatic protection as a human right could be based on existing international law or would become part of the international legal order in the immediate future. In general, however, it agreed with the conclusions of the open-ended Working Group on how the issues presented by the topic should be tackled.

10. With regard to unilateral acts of States (chapter VI), he said that, considering the intrinsically complex nature of the topic and the many diverging views on the meaning of "unilateral acts" in theory and practice. The report was commendable for its clarity and intellectual maturity. Given the differences of opinion and the sheer practical difficulties involved, however, the Commission ought to take a conservative or narrow approach. It should focus on unilateral declarations to the exclusion of other unilateral expressions of the will of States, thus enormously simplifying its work and, possibly, ensuring its early and successful conclusion. In that context, his delegation strongly believed that the final product ought to be in the shape of a draft guide to practice rather than a draft convention.

11. On the question of whether the scope of the topic should be extended to cover such unilateral acts of States as declarations issued vis-à-vis subjects of international law other than States, a broad approach would clearly be preferable. Given the growing participation of actors other than States in the international legal process, it was desirable for the Commission to include in its review declarations by States to international organizations and, possibly, to additional, limited subjects of international law. The Commission should also consider whether, and, if so, to what extent, declarations of States within international organizations would fall within its ambit. The draft document should avoid discussing unilateral acts giving rise to State responsibility or those covered by the Vienna Convention on the Law of Treaties. On the other hand, his delegation was not convinced of the usefulness of all the exclusionary criteria proposed in paragraph 156. If strictly applied, the proposed exclusions would deprive the Commission of much of its basic evidentiary material for developing a legal document on the topic.

12. With regard to State responsibility (chapter VII), he would restrict himself to restating his delegation's position on some key issues. The concept of international crimes should be deleted from the draft articles. Not only had the distinction between "international crimes" and "delicts as internationally wrongful acts" become increasingly attenuated in the draft articles, as far as consequences were concerned, but the concept itself fitted uneasily into a set of secondary rules. For the same reason, "Circumstances precluding wrongfulness" should not be revisited. Consideration of any legal consequences flowing from State conduct, notwithstanding the existence of circumstances precluding the wrongfulness of that conduct, was clearly beyond the scope of the draft articles on State responsibility, which were, of course, predicated on there having been wrongful State conduct in the first place.

13. On the issue of attribution, consistency and symmetry of language in the provisions of chapter II of Part One of the draft articles were important. The draft text – and specifically draft article 9 – was deficient in that respect. Moreover, on the specific question in paragraph 35, which asked whether all conduct of an organ of a State was attributable to that State under article 5, irrespective of the nature of the conduct, his delegation questioned the usefulness of the *jure gestionis* or *jure imperii* criteria. The relevant draft articles (5–10) distinguished between conduct of the organ of the State acting in that capacity and conduct by persons, entities or organs of another State involving the exercise of elements of governmental authority of the State. Neither formulation was entirely free of ambiguity and the former, in particular, was potentially problematic. The attribution of one and the same type of conduct to the State might well vary in accordance with a given State's definition of "organ". The attempt to give a more precise definition of "act of State" was understandable, but the assumption that the act of State for purposes of State immunity was identical with the act of State for purposes of State responsibility was unwarranted, even if any act of State for purposes of State immunity (*actum jure imperii*) would also involve conduct of a State organ "acting in that capacity" for purposes of State responsibility. The reverse, however, was not true. The law of State responsibility and of State immunity represented different fields of international law and were thus subject to different policy considerations.

14. His delegation was in basic agreement with the general structure of the draft articles, however, including that of Part Two. The Commission ought to focus on revising and refining the existing draft articles – only where necessary – with a view to the early completion of a generally acceptable instrument on State responsibility. The draft articles

provided an excellent basis and, indeed, had already begun to shape the practice of States. Any major changes would therefore undermine the growing authority that many of the draft articles were acquiring. Revisions would create undesirable delay in finalizing the draft articles – whether they appeared in the form of a draft declaration of principles or a draft convention – and at worst would render the prospect of their adoption uncertain.

15. With regard to nationality in relation to the succession of States (chapter VIII), his delegation did not wish to see a continuation of the second part of the topic, as currently defined. The issues concerning legal persons were too specific and, at the same time, not sufficiently pressing for consideration by the Commission. His delegation was, however, inclined to endorse the idea of the Commission's taking up the nationality of legal persons as a wholly separate new topic.

16. On reservations to treaties (chapter IX), his delegation particularly welcomed the attempt to define the meaning of "reservations". It also agreed with the substance of draft guideline 1.1.5 of the proposed guide to practice, but questioned the need for such a provision. The fact that a State or an international organization expressed its willingness to extend its obligations beyond those to which it had agreed under a treaty did not modify the legal effects of any obligation arising under that treaty. Such a declaration did not therefore amount to a reservation. By the same token, the formulation of draft guideline 1.1.6 was rather clumsy and unbalanced. More importantly, the guideline was essentially superfluous, merely restating the essence of the notion of reservation.

17. With regard to the Commission's long-term programme of work (chapter X.C), his delegation expected that the Commission would follow through on its study of prevention, as the first part of a two-step analysis of the original topic of international liability. It would be prepared to support a project focusing primarily on the principles of the liability of non-State actors for transboundary physical harm, as established in various international legal conventions, and only secondarily on States' subsidiary liability. Such an approach would be more germane to the realities of international – or rather transnational – life, which were increasingly shaped, especially in the economic sphere, by individuals or corporations. The second part of the study should therefore focus not only on the principles of civil liability but also on States' international liability, and it would have to address the specific relationship between the two. As for new topics, his delegation would particularly welcome the inclusion as a matter of priority, of the following topics: responsibility of international

organizations; effects of armed conflicts on treaties (focusing on international rather than domestic conflicts); expulsion of aliens, as the Commission had proposed; and shared natural resources.

18. In response to the Commission's request for guidance on issues relating to the protection of the environment, raised in chapter II, his delegation urged the Commission to adopt a modest approach in that regard. There would be little merit in a project that sought to cover the international law of the environment, even if only in the form of a framework instrument. International law on the topic was, paradoxically, too generic on the one hand, yet too specific on the other, to lend itself to any meaningful general restatement. Moreover, there was a risk of duplicating work being carried out in other, mostly specialized law-making forums. The topic had already been discussed in the Second Committee under agenda item 94, entitled "Environment and sustainable development", and in the report of the Secretary-General on ways and means of undertaking the review of progress made in implementing conventions related to sustainable development (A/53/477). The Commission should take stock of the work undertaken in other bodies within the United Nations system before it embarked on elaborating rules on environmental issues. In short, apart from those already mentioned, there were no obvious environmental topics that the Commission could suitably adopt for its long-term work programme.

19. **Mr. Baker** (Israel), referring to chapter IV of the report, said that his delegation fully agreed with the decision to separate the regime of prevention from that of liability. In cases involving a private operator, however, State responsibility and civil liability would not adequately protect legitimate environmental interests. The duty of prevention should therefore be regarded as an obligation of conduct that was inspired by a detailed and universally applicable code of conduct comprising the standards already embodied in the current international conventions on the environment and other related matters. That being so, it was not essential that the draft articles should take the form of a convention. The elaboration of guidelines forming the framework for regional arrangements could therefore be considered instead. He wished to emphasize need for an expeditious mechanism for the settlement of disputes arising from the interpretation or application of the draft articles, particularly in connection with the assessment of the obligation of conduct. He fully concurred with the approach of adopting prevention as a preferred policy, and wished to stress that it was vital to avoid means of dispute settlement that could lead to extended delay or controversy. To that end, he recommended

the use of direct and open negotiation and conciliation between the State of origin and any other States concerned.

20. Draft article 3 was too concise and could be enhanced by the addition of elements derived from existing conventions on the environment that would enable it to serve as a basis for the code of conduct he had already mentioned. The concept of cooperation in good faith referred to in draft article 4 could be strengthened with a view to overcoming any tendency to sideline environmental considerations in favour of political and security interests, for example. That being so, the principle of bona fides should perhaps be given a more pragmatic and detailed character in the draft articles, and the need for a more detailed mechanism to ensure that States upheld the principle of cooperation in good faith could also be considered. Lastly, the concept of authorization covered in draft article 7 required further elaboration, particularly in order to define the type of operator referred to in paragraph (8) of the commentary to that article in view of the legislative and administrative proceedings that could be involved.

21. Turning to the topic of diplomatic protection (chapter V of the report), he expressed his support for the conclusions summarized in paragraphs 108 (a) and (c). Clearer reference should be made, however, to the view that the exercise of diplomatic protection in certain cases involving a foreign State could become secondary to foreign policy considerations deemed substantial enough to justify overriding the relative importance of such protection. The fact that State practice appeared to bear out that position indicated the need to introduce some element of hierarchy into the weighing of a State's interest or obligation concerning the protection of its nationals against its wider diplomatic or political interests, particularly in the case of human rights issues. In certain cases, however, arrangements to realize an individual's right to protection could be better achieved between the two States concerned through the diplomatic channel. Given the number of instances in which the individual was treated as a direct beneficiary of international law, he also concurred with the recommendation contained in paragraph 108 (d) that the effect of such developments should be examined in the light of State practice. Consideration might later be given to situations in which a State was placed in an unnecessary position by an individual who made a wrongful claim or a claim that was unfounded in international law.

22. **Mr. Monagas-Lesseur** (Venezuela) emphasized the need for a broad interrelationship between the Commission, composed of independent experts, and the Committee, composed of representatives of Member States. The Commission could not discharge its mandate properly if

States did not provide it with definite guidelines. In that connection, it was essential for States to respond, both orally and in writing, when their views were sought.

23. Turning to chapter IV of the report, he said that the draft articles bore an important relationship to the Convention on the Law of the Non-Navigational Uses of International Watercourses, adopted in 1997 after a long and complex negotiating process. His delegation hoped that the General Assembly would adopt a resolution seeking comments from States on the proposed articles so as to be able to conclude the draft during the current quinquennium, as indicated in paragraph 54 of the report.

24. While it might be premature to define at the current stage the final form which the draft articles should take, his delegation believed that the most appropriate form would be that of a framework convention modelled on the 1997 Convention.

25. While the dispute settlement mechanism provided for in draft article 17 was appropriate, it could be fleshed out along the lines of the 1997 Convention. It might be possible to delete the second sentence of paragraph 2 of the article, which suggested that the findings of the independent and impartial fact-finding commission should be non-binding or of a recommendatory nature, as they would only reflect the facts and would in no way constitute suggestions for settlement of the dispute.

26. The scope of application of the draft, as defined in article 1, was limited to activities not prohibited by international law which involved a risk of causing significant transboundary harm. The term "significant transboundary harm" was complex and tainted by ambiguity, as discussed in other contexts. In that connection, his delegation shared the view of most members of the Commission that the article should refer in general terms to activities not prohibited by international law, without entering into an enumeration of such activities, as that could affect the scope of application of the draft.

27. Consideration should be given to article 2 (c), which limited transboundary harm to "harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border". That provision, which was otherwise acceptable, should essentially have a spatial connotation.

28. Article 2 (a) referred to the "risk of causing significant transboundary harm" as encompassing "a low probability of causing disastrous harm and a high probability of causing other significant harm". The phrase "other significant harm"

appeared, at least in the Spanish version, to refer to a second type of harm, whereas it was his delegation's understanding that the harm was the same in both cases.

29. His delegation was also of the view that the obligation set out in draft article 3 should be regarded as an obligation of conduct and not of result. The State was thus obligated to prevent or to minimize the risk of causing significant transboundary harm.

30. Article 4 set forth a basic principle of the draft, namely, the obligation of States to cooperate in good faith. His delegation believed that the article should simply state that principle; the rest of the text could be placed in a separate article stipulating that States should, as necessary, seek the assistance of international organizations.

31. Lastly, Venezuela believed that the notification system, including procedures in the absence of notification and the procedures relating to information and consultations, were generally appropriate.

32. **Mr. O'Hara** (Malaysia), speaking in connection with chapter IV of the report, said that his delegation approved of the Commission's view that prevention as a policy was better than cure. He stressed, however, that the concept expressed in draft article 8 on impact assessment, while worthy of merit, should under no circumstances be interpreted as depriving a State of its sovereign right to develop its natural resources in the interests of its economic well-being.

33. Concerning chapter V, he believed that caution should be exercised in the effort to develop universal acceptance of laws on the subject of diplomatic protection with a view to avoiding undue reliance on outdated materials and ideas. In addition, it was essential to take the views of the developing world into account. There was a clear need to distinguish between the possession by States of diplomatic protection rights and their consequent exercise of such rights in regard to individuals under their protection. It was a State's sovereign prerogative to protect the rights and interests of an individual who was linked to it by nationality. However, since a State might fail to pursue the cause of such an individual for reasons beyond his control relating to the relative influence which his State possessed in the international arena, the Commission should take into account the need to establish guidelines on the discretionary power of States to provide diplomatic protection.

34. Turning to chapter VI, unilateral acts of States, he pointed out that Article 38 of the Statute of the International Court of Justice did not specifically mention unilateral acts and recalled the common argument that such acts could not

be a source of international law, as well as the argument that they were simply instruments of execution that did not establish general rules. The Statute of the International Court of Justice, however, did not constitute an exhaustive list of the sources of international law, in which case his delegation believed that unilateral acts could be included as one such source. In view of the work yet to be done on that subject, he supported the suggestion that the Commission should elaborate draft articles defining a unilateral act. That definition was vital to establishing the parameters of the topic and would also provide the necessary focus for the achievement of progress in that regard.

35. **Mr. Mochochoko** (Lesotho), *Vice-Chairman*, took the Chair.

36. **Mrs. Reza** (Indonesia) said that her delegation concurred with the widely-held view that in the context of international liability for injurious consequences arising out of acts not prohibited by international law, prevention as a policy was better than cure, an approach which was also reflected in various conventions and multilateral treaties on the environment. However, it might be disadvantageous to draw up a comprehensive list of all hazardous activities at the current stage in view of the rapid pace of technological change and its potential consequences. In that connection, she cited the four criteria covered by draft article 1 and listed in the commentary thereto. Her delegation attached great importance to the fundamental principle of a State's inherent sovereign right to exploit its natural resources in accordance with national legislation while simultaneously ensuring that such activities caused no damage to the surrounding environment, and considered that assistance should be extended to developing nations to enable them to meet the standards of care required under draft article 1. Draft article 4 contained the essential elements for promoting cooperation for environmental protection, a prerequisite for furthering the implementation of policies aimed at deterring exposure to harmful risks. Draft articles 9, 10 and 14 followed the new trend in international law by obliging States to provide the necessary information to the public in the decision-making process concerning environmental issues, while draft article 15 sought to create a balance between the information disclosed to the public and information withheld by a State due to national security considerations. Her delegation looked forward to commenting in further detail on the legal regime governing the draft articles.

37. With regard to the question of diplomatic protection, it was timely and appropriate for the Commission to codify that area of law and in so doing to give particular consideration to the views of the developing countries. Her delegation subscribed to the view that the exercise of

diplomatic protection was the sovereign prerogative of a State that paralleled the time-honoured tenets of sovereignty and territorial integrity. As to the relationship between diplomatic protection and human rights, they should be dealt with as separate issues, as diplomatic protection could not be marginalized by human rights considerations and vice versa. The proposal made in 1997 by the Working Group on diplomatic protection to focus on the basis for diplomatic protection was a constructive beginning, just as the proposal contained in the Commission's current report to elaborate draft articles and commentaries on the topic was worthy of merit.

38. Having reiterated her delegation's support for enhancement of the mutually beneficial cooperation between the Commission and other legal bodies, in particular the Asian-African Consultative Committee, she underscored the importance of promoting international law through seminars, particularly for students from developing countries. Her delegation was confident that, in fulfilling its mandate, the Commission would reflect new developments in international law, as well as the concerns of the international community.

39. **Mr. Mounkhou** (Mongolia), said his delegation welcomed the significant progress made on the topic of international liability for injurious consequences arising out of acts not prohibited by international law. The draft articles appeared to meet their intended objective, while the suggested title was compatible with their substance. In that context, the definition of their scope of application was acceptable and the provisions giving effect to the concept of prevention were in order. Draft article 3, on prevention, which was regarded as an obligation of due diligence and not one of result, was clearly the most important of all the draft articles, although the importance of the principle of good faith embodied in draft article 4 could not be overemphasized. Draft article 7, in particular paragraph 2, was similarly important and in full compliance with the task of prevention. His delegation welcomed draft article 9, which reflected new trends in international environmental law, and commended the approach adopted in draft article 12, which provided significant guidance to States. Draft article 17 was also acceptable at the current stage, although it required some elaboration in respect of arbitral settlement. His delegation also favoured the provision contained in draft article 17, paragraph 2, concerning recourse to the appointment of a fact-finding commission.

40. Despite their excellent drafting, the draft articles left his delegation with a feeling of perplexity, which had to do perhaps with the separation of the regime of prevention from that of liability, an effect to which the representatives of

Guatemala and the United Republic of Tanzania had also referred. His delegation had doubts as to the effectiveness of separating prevention from liability, especially in the context of preventing transboundary damage resulting from hazardous activity. Mongolia would have preferred a broader approach to international obligations that would also cover liability. The obligations of States in the area of environmental protection were very important, involving as they did the well-being of current and future generations. In that connection, he drew attention to Principle 21 of the 1972 Stockholm Declaration on the Human Environment, which declared, *inter alia*, that States had the responsibility to ensure that activities within their jurisdiction or control did not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. The International Court of Justice had confirmed in its advisory opinion on the legality of the threat or use of nuclear weapons that that obligation had become part of the corpus of international law on the environment.

41. Lastly, while his delegation would prefer that the questions raised by the Commission be considered following the review of the regime of liability, it was prepared to join other delegations in taking a decision on them at the current session. His delegation considered that the draft articles should take the form of a model law; as to the form of the dispute settlement procedure, it was in favour of a provision on arbitral settlement.

42. **Mr. Lemma** (Ethiopia) said the fact that the topic of international liability for injurious consequences arising out of acts not prohibited by international law was being discussed after the adoption by the General Assembly of the Convention on the Law of the Non-Navigational Uses of International Watercourses further complicated the issue. The Convention, because of the sensitivity of its subject-matter, did not stand a very good chance of coming into force in the near future. The main issue which had threatened to undermine its adoption and which continued to impede its implementation was the relationship between the principle of equitable use and that of "no significant harm". Many countries, including his own, had refrained from endorsing the Convention mainly because the "no-harm" element was given undue prominence therein.

43. His delegation believed that the topic under consideration overlapped somewhat with the subject-matter of the Convention. The fact that both instruments formed part of the body of international law and were destined to influence each other's interpretation was the source of his delegation's concern.

44. It should be noted that the phrase "significant harm" was used in the draft articles in the same way as in the Convention. In draft article 2, an attempt was made to define the term "harm" as including harm to persons, property or the environment. That was a clear indication that the term "harm" in the current context related to "harm" as defined in article 7 of the Convention.

45. While no attempt had been made to define the term "significant" in the Convention, the Commission's commentary for the draft articles contained a definition of the term which had a detrimental effect on the Convention. Paragraph (4) of the commentary to draft article 2 stated: "It is to be understood that 'significant' is something more than 'detectable' but need not to be at the level of 'serious' or 'substantial'". It was further stated that "harm" included a detrimental effect on human health, industry, property, environment or agriculture in other States. His delegation failed to understand how that discussion differed from the earlier debate on article 7 of the Convention and how it could be guaranteed that the draft articles would not be used in interpreting the controversial concepts referred to above.

46. Turning to chapter V of the report, he said that the title "diplomatic protection" did not seem to cover the content of the instrument to be developed. The underlying concept was the role of the State as an agent in protecting the rights of its nationals under the jurisdiction of other States. The State acted on behalf of its nationals who lacked the capacity to exercise their rights under the legal system of the host State. If the issue could be handled by the Government or authority of the host State, the case would fall within the domestic jurisdiction of that State. His delegation therefore suggested that the title should be amended, as the phrase "diplomatic protection" connoted traditional State-to-State relations and appeared to be easily confused with the law on diplomatic relations, which had the protection of diplomatic rights and duties as its main purpose.

47. The relationship between State responsibility and diplomatic protection needed further elaboration because of the large common ground that existed between the two concepts. The efforts made by the Special Rapporteur in that area were very encouraging.

48. Lastly, human rights and diplomatic protection were closely interrelated. A significant share of the issues falling under the topic of diplomatic protection were human rights issues; all allegations of mistreatment of nationals of one State in another State generally involved the abuse or alleged abuse of human rights. Accordingly, caution must be exercised when trespassing on the regime of human rights

law, as a delicate balance existed in that area which must be preserved.

49. Mr. Yin Yubiao (China) said that the topic of diplomatic protection involved a series of complicated theoretical and practical questions. As was well known, diplomatic protection had an unfortunate history, having been regarded as an extension of colonial power or a system imposed by powerful States on weak States. The Calvo clause had been a kind of legal reaction on the part of Latin American developing countries to the exercise of diplomatic protection by foreign States. In 1924, in the *Mavrommatis Palestine Concessions* case, the Permanent Court of International Justice had stated clearly that a State had a right to protect its nationals when they were injured by internationally wrongful acts of another State and a satisfactory settlement could not be obtained through normal channels. That had become a basic principle of international law.

50. Hence, the purpose of diplomatic protection was to rectify the unfavourable and unjust treatment suffered by a State's nationals as a result of violations of international law by another State. Although it had been abused in the past and would probably be abused in the future, diplomatic protection was not in itself a system used by the big and powerful to bully the small and weak. Practice had shown that diplomatic protection had its advantages and it had been adopted by many States in various regions.

51. The core of diplomatic protection was that protection could be exercised only by the victim's State of nationality, because only that State could invoke the responsibility of the host State as a result of the latter's violation of international obligations. Nevertheless, in deciding whether to exercise diplomatic protection in a certain case, a State needed to consider not only the interests of the victim, but its overall interests in accordance with its foreign policy.

52. The Special Rapporteur had raised an important issue in his report, namely, that in the light of recent developments, such as the increasing tendency to regard the individual as a subject of international law and the establishment of claims committees through which victims could make claims directly against another State, traditional diplomatic protection appeared to be obsolete and should be reassessed. His delegation was of the view, however, that in the current international context, the argument that the individual was regarded as a subject of international law was untenable, and therefore, the role of States in exercising diplomatic protection could not be denied.

53. On the question of primary and secondary rules, diplomatic protection belonged mainly to the category of

secondary rules. The question of whether rules should be classified as primary or secondary, however, also depended on the specific issues involved. The "clean-hands" rule, the rule requiring exhaustion of local remedies and other rules had a dual function; accordingly, a certain flexibility was needed.

54. In exercising diplomatic protection, consideration should also be given to the use of countermeasures, as permitted by international law.

55. **Mr. Beránek** (Czech Republic), referring to chapter IV of the report, said that his Government was still in the process of studying the draft articles. The Czech Republic supported the Commission's recent decision to split the topic of international liability into two parts and to deal first with prevention and later, if at all, with liability. That approach seemed to be a promising way out of the impasse in which the Commission had increasingly found itself. It was encouraging to note that after taking that decision, the Commission had been able to move expeditiously and to complete the first reading of the draft articles within a short period of time.

56. His delegation supported the main thrust of the draft articles. The scope of application appeared to be defined adequately by means of a threshold applying to both risk and harm. The term "significant" had given rise to much debate in the past, including during the negotiations concerning the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses, to the point where the controversy now appeared to have exhausted its potential. Under those circumstances, the choice of the term "significant" appeared to be justified.

57. Prevention was construed appropriately in the draft as an obligation of conduct, based not on an absolute concept of minimization of risk, the limits of which would be very difficult to grasp, but on the crucial requirement of an equitable balance of interests among the States concerned. The proposed system, as set out in draft articles 3, 11 and 12, seemed to be satisfactory and fairly close to the one adopted in the context of the 1997 Convention. His delegation regretted, however, that article 3 of the draft, unlike article 7 of the Convention, contained no reference to a balance of interests among the States concerned. The relevant provisions were found only in draft articles 11 and 12, which contained procedural provisions. That could lead to difficulties and possible misunderstandings. The Commission should perhaps reconsider the issue during its second reading of the articles.

58. The draft procedural provisions established mechanisms for the implementation of the obligation of

prevention, mainly through information, notification and consultations, and including the requirements of prior authorization and transboundary impact assessment. Some questions, however, required further clarification. For instance, in the commentary to draft article 13, it was unclear what the rationale was for including in "Procedures in the absence of notification" the additional and somewhat ambiguous elements contained in paragraph 3 of the draft article.

59. As to the specific issues identified in chapter III of the report on which comments would be of particular interest to the Commission, his delegation envisaged in reply to the question raised in paragraph 32, three distinct cases.

60. First, if there was no breach of the obligation of prevention or of other obligations under the draft articles or other rules of international law and transboundary harm nonetheless occurred, that posed the problem of liability, which clearly fell outside the scope of the topic.

61. Secondly, if damage occurred as a result of a breach of the obligation of prevention or of other obligations of the State of origin, the latter's international responsibility was engaged and full reparation was due, provided that a causal link could be established between the wrongful act or omission and the damage. The obligation of prevention was, by definition, an obligation of conduct, and its breach might therefore not always be easily proved. A breach of some of the procedural obligations under the draft articles, such as timely notification or temporary suspension, might be easier to establish, but the causal link between such a breach and the occurrence of the damage might frequently be missing. In such a case, the resulting situation might often be similar to one where there was no material or moral damage as a result of the breach of an obligation.

62. Thirdly, if obligations were not fulfilled, but no damage was caused, then there was still, strictly speaking, room for international State responsibility, which was defined in broader terms than the notion of responsibility in a number of domestic legal systems. In accordance with article 1 of the Commission's draft articles on State responsibility, "Every internationally wrongful act of a State entails the international responsibility of that State". The injury suffered by a State was understood simply as any infringement of its rights by a wrongful act of another State. In practical terms, however, in the absence of any material or moral damage, responsibility would entail merely the obligation of cessation of the wrongful conduct and perhaps elements of satisfaction. Those issues should be dealt with not in the framework of prevention, but under the topic of State responsibility.

63. With regard to the other questions raised in paragraphs 33 and 34 of the report, his delegation did not consider a model law to be the appropriate form for the eventual outcome of the Commission's work on the topic. As far as the dispute settlement provisions of the draft were concerned (article 17), his delegation saw merit in preserving the necessary flexibility in the choice of peaceful means of settlement. Compulsory recourse to a fact-finding commission was sufficiently flexible and might be useful for the purposes of establishing and assessing facts relevant to the dispute. The details concerning the composition and functioning of the fact-finding commission could be laid down in a separate annex, for which the provisions of article 33 of the Convention on the Law of the Non-Navigational Uses of International Watercourses might serve as a model.

64. Mr. Leanza (Italy) said that the length of time which the Commission had devoted to the topic of international liability for injurious consequences arising out of acts not prohibited by international law demonstrated the difficulty of distinguishing between liability in the absence of a wrongful act, no-fault liability and strict liability, whether relative or absolute. Except in the case of certain treaties, contemporary international law could not really be said to include a concept as sophisticated or as characteristic of solidarity as that of liability for acts not prohibited by law. He therefore fully supported the Commission's decision to separate the question of prevention of damage from that of State responsibility and to focus, at least initially, on the former. Prevention was the best system of protection because of the difficulty of restoring the situation prevailing prior to the event which had caused harm, regardless of whether such harm had been incurred by individuals, property or the environment. From that point of view, the draft articles developed by the Commission were logical, complete and moderate.

65. He also supported the decision to distinguish between harmful activities and those which were merely hazardous in the sense that they entailed a risk of significant transboundary harm. On the other hand, he understood, but did not agree with, the reasons for the decision to limit the obligation of prevention to harm caused in the territory of or in other places under the jurisdiction or control of another State. The International Court of Justice, in its advisory opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict, had referred to prevention specifically in relation to regions over which no State had sovereignty.

66. He was pleased that the new set of draft articles included not only the concept of prevention (article 3) but also that of cooperation (article 4), which was closely linked

to the former principle and complemented it by stressing the transboundary nature of environmental protection. Article 12 was also interesting in that it specifically set forth the need to achieve a balance between the interests of the State of origin and those of States likely to be affected by hazardous activities, which was an important principle from the point of view of sustainable development.

67. Under international law, States had a responsibility to exercise due diligence in the prevention of significant transboundary harm, particularly beyond a certain threshold of tolerance. Therefore, States which carried out harmful activities or allowed others to do so within their territory failed to comply with that obligation and incurred liability for wrongful acts. That conclusion was based on international judicial practice, various international, bilateral and multilateral agreements and declarations and resolutions adopted at international conferences. However, the possibility must be borne in mind that no liability would be incurred if the State or States which might be harmed gave their consent, however conditional or temporary, for such activities to be carried out within their territory.

68. He did not support the Commission's definition of prevention as an obligation of conduct, not of result. Because prevention consisted of taking all necessary measures to prevent hazardous activities from causing harm, it presupposed certain standards of due diligence which, if met, relieved the State of all responsibility. However, an obligation of result would make the State responsible for all transboundary damage, regardless of its own behaviour, and would therefore assign absolute responsibility for an unspecified range of hazardous activities. Moreover, prevention was an obligation of conduct under most systems of domestic law.

69. He did not think that the draft articles should call for penalties in cases where States failed to comply with their obligation of prevention, whether or not transboundary damage had occurred. In the first place, the purpose of the international legal system was not to punish, but to correct, violations. Furthermore, since the obligation of prevention applied specifically to transboundary harm and therefore, by implication, to violation of the sovereignty of another State, in cases where no violation had taken place there could be no justification for the imposition of penalties.

70. It would be preferable for the draft articles to take the form of a framework convention, so that States would be bound by its provisions without losing the freedom to conclude more detailed bilateral or multilateral agreements with respect to specific hazardous or harmful activities or

geographical regions with a high concentration of such activities.

71. The issue of procedures for dispute settlement was closely linked to that of the final form of the draft articles. If it was decided to include those articles in a convention, the procedures for dispute settlement should be described in detail and included in the text of the instrument, and a compulsory mechanism such as an arbitral tribunal must be provided for. If, however, the Commission opted for a framework convention, it would be better for the section on dispute settlement, including a compulsory procedure, to take the form of a protocol. Lastly, if the draft articles took the form of a model law there would be no need for a detailed description of dispute settlement procedures, and a reference to diplomatic and arbitral instruments for the amicable resolution of international disputes under international law would suffice.

72. With regard to diplomatic protection, the Special Rapporteur's preliminary report provided a useful basis for discussion of a broad and complex topic which was appropriate for codification and progressive development. The report was particularly useful for its treatment of diplomatic protection under customary law, the relationship between human rights and diplomatic protection, the criteria for diplomatic protection, the question of "primary" and "secondary" rules and the relationship between diplomatic protection and State responsibility.

73. With respect to the customary conception of diplomatic protection, he did not think that the State's legal interest in the fate of its nationals involved a legal fiction. While that fiction had been useful in the past, when it had been the individual's only protection at the level of international law and had provided a means of engaging the host State's responsibility for individuals, numerous more recent international agreements had recognized the right of individuals to protection, independently of any action by the State of which they were nationals, by establishing an obligation *erga omnes* for the protection of their human rights. However, no fiction was involved in recognition of States' right to ensure that their citizens were treated in accordance with international standards and human rights instruments. As had been established in the *Mavrommatis Palestine Concessions* case, that right was exclusive to the State, which, in extending diplomatic protection, protected not only its own sovereignty but also the interests of its nationals.

74. Great caution must be exercised in assimilating diplomatic protection and the protection of human rights or establishing a hierarchy between them. International human

rights instruments limited the scope of national jurisdiction by guaranteeing uniform standards of protection, whereas diplomatic protection functioned exclusively in relations between States and after domestic remedies had been exhausted. In his opinion, the conditions for the exercise of diplomatic protection were those established in the *Mavrommatis Concessions* case; they were contingent on the existence of harm suffered by an individual and failure to obtain satisfaction under domestic legislation.

75. Lastly, he agreed with the members of the Commission who had considered the distinction between "primary" and "secondary" rules useless in the context of diplomatic protection, and he did not think that it would be appropriate to focus on the relationship between the international responsibility of States and diplomatic protection since the latter was only one aspect of a much larger field of responsibility.

76. **Mr. Westdickenberg** (Germany), referring to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, observed that the Commission's 1997 decision to deal first with the issue of prevention of transboundary damage from hazardous activities had been a very wise one. The draft articles on the topic struck a judicious balance between the economic interests of States of origin and of States likely to be affected, and correctly concentrated on the key principle of prevention.

77. The entire set of draft articles was based on the obligation of States to exercise due diligence, to act in good faith and to cooperate, as set forth in draft articles 3, 4 and 5. That was the right way to achieve an effective and reasonable legal framework on the subject of prevention of transboundary damage from hazardous activities. His Government agreed with the core idea of draft article 10 that it was the duty of the State of origin to notify those States that were likely to be affected by the planned activity. The use of the words "with timely notification" allowed for more flexibility than the corresponding wording used in the 1996 draft (A/51/10, Annex I, art. 13).

78. Article 11 maintained an appropriate balance between the interests of the States concerned by emphasizing the manner in which, and the purpose for which, the parties entered into consultations. Article 12 provided some guidance for States in their consultations about an equitable balance of interests, and seemed to establish many factors that States could consider in seeking to strike such a balance.

79. It was difficult at the current stage to answer all the questions the Commission had put to Governments. For that reason, the Commission should proceed with caution. In that

connection, he wished to emphasize draft article 6, which stated clearly that the existing draft articles were without prejudice to the existence, operation or effect of any other rule of international law. That was an important clarification. His Government completely supported the Commission's work on a comprehensive set of articles on prevention of transboundary damage from hazardous activities. On the other hand, other rules and developments in that area of international law should be admitted, and it was important not to make premature commitments concerning the subject.

80. Two other articles on the topic of international liability were of central importance. One of them was article 16, which was based on article 32 of the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses and provided that the State of origin had to grant access to its judicial or other procedures without discrimination on the basis of nationality, residence or the place where the injury occurred. Therefore, that State had to ensure that any injured person received the same treatment as that afforded by to its own nationals under domestic law. That constituted a very central provision. Article 17, on settlement of disputes, which was inspired by article 33 of the 1997 Convention, provided the possibility of a compulsory settlement procedure by instituting a fact-finding commission if the dispute had not been settled by any other means within a period of six months. That provision was a very useful amendment to the 1996 draft; it remained to be seen whether it would be sufficient. In any case, the procedure for the settlement of disputes arising from the application and interpretation of the draft articles was of great importance and was even more essential in the topic under consideration than in other fields of international law.

81. With regard to the topic of State responsibility, his Government was satisfied not only with the new article 5, but also with the other new articles of chapter II of Part One. The Commission had drafted clear, precise definitions of the conduct which could be considered as attributable to a State as an act of the State. Especially, articles 7, 8, and 8 *bis*, covering different situations involving persons or groups acting outside the structure of State organs, seemed to fill a gap in the previous draft articles. The same was true for articles 9 and 15.

82. Concerning the questions of reparation and compensation dealt with in chapter II of Part Two, his Government would prefer to emphasize general principles rather than very detailed and specific provisions, so that the relatively complex subject matter of reparation and compensation could be dealt with in a satisfactory way while allowing enough flexibility for specific cases.

83. He noted that in 1996, the Commission had adopted on first reading draft article 40, paragraph 2 (e) (iii) of which provided that every State had to be considered an injured State where the act of another State infringed a right arising from a multilateral treaty or from a rule of customary international law, if it was established that the right had been created or was established for the protection of human rights and fundamental freedoms. That definition implied the *erga omnes* effect of violations of fundamental human rights or of international humanitarian law, and established the right of any State to take reprisals against the State responsible for such violations. The principle established by article 40, paragraph 2, was of the utmost importance to his Government, which considered that it restated customary international law by allowing reprisals by any State against States that violated fundamental human rights or international humanitarian law.

84. *Mr. Enkhsaikhan (Mongolia) resumed the Chair*

85. *Mr. Lahiri (India)* said that because of its far-reaching implications, the prevention of transboundary damage from hazardous activities called for broad-based debate rather than precipitous action in order to avoid the type of controversy that had beset the framework convention on the law of non-navigational uses of international watercourses. It must be remembered that the international community's growing concern for the environment and for the transboundary consequences of hazardous activities had been expressed within a framework that acknowledged the relationship between environment and development. Sustained economic growth, the eradication of poverty and the importance of meeting the basic needs of populations were overriding priorities for developing countries, which could not meet the goal of environmental protection without the international community's financial and other assistance and recognition of the fundamental premise of common but differentiated responsibility.

86. He was concerned at the lack of a specific definition of hazardous activities, many of which were crucial for development, and of precision in defining terms such as "risk of causing significant transboundary harm". Such imprecision was particularly disturbing in a legal instrument which dealt with issues of liability, compensation and unilateral invocation of arbitration as a procedure for dispute settlement. Principle 11 of the Rio Declaration stated that environmental standards applied by some countries might be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.

87. The Commission had sought to address the need for an equitable balance of interests in draft article 12 and the

issue of the relationship between prevention and the capacity of the States concerned in the commentary to article 3 (para. 16). However, much remained to be done if the draft articles were to be brought into line with the international consensus on the need to balance developmental and environmental imperatives. The draft articles failed to embody important principles such as the sovereign right of States to exploit their own natural resources according to their own policies, the concept of common but differentiated responsibility and the international consensus on the right to development; in that regard, it was unfortunate that none of the draft articles had been devoted specifically to the need for an overall balance between the environment and development, as established at the United Nations Conference on Environment and Development.

88. He also had reservations regarding the requirement that the public must be informed of potential risk (draft article 9) and the principle of non-discrimination (draft article 16). Unless the States concerned had compatible legal systems, the implementation of those provisions could raise numerous questions of jurisdiction and effective implementation. Draft article 16, in particular, could serve only as a guideline for progressive legislative development.

89. He was opposed to compulsory third party dispute settlement since the type of dispute which was likely to arise was more amenable to resolution through negotiation; moreover, settlements achieved through third party intervention were unlikely to result in compliance and, at best, might provide only a temporary solution. Further consideration should therefore be given to the inclusion of draft article 17, paragraph 2, in its current form. In any case, if the draft articles were to form part of a framework convention or set of guidelines, it was less important to provide for a compulsory dispute settlement mechanism. He noted that the programme for the further implementation of Agenda 21 reiterated the need for dispute settlement procedures or mechanisms to be broad-based and in line with Article 33 of the Charter of the United Nations.

90. The concept of "due diligence" did not lend itself to codification. Furthermore, in view of the differences between the levels of economic and technological development of States and the shortage of financial and other resources in developing countries, there should be no penalties for non-compliance with obligations by a State or operator which, while willing, lacked the capacity to do so.

91. In his opinion, many of the concepts reflected in the draft articles did not yet constitute established principles of international law, nor did they reflect the international consensus on the need for a balanced approach to

development and the environment. Moreover, they were handicapped by a lack of precision with respect to the very activities with which they purported to deal. He therefore suggested that the Commission should reconsider the issues reflected in the draft articles and endeavour to provide a more balanced framework for the Committee's discussion.

92. **Mr. Rebagliati (Argentina)** said that his delegation noted with satisfaction the progress made by the Commission in its reformulation of the rules on State responsibility. The discussion on the distinction between "crime" and "delict" had been particularly enlightening.

93. He wished to point out that earlier in 1998, Argentina had argued in favour of reconsidering the matter of excluding damage from the definition of an internationally wrongful act. Damage was a fundamental element of State responsibility, the principle being that anyone who caused damage must make reparation. His delegation had reservations regarding the terminology used in distinguishing between international crimes and delicts. That terminology, which was taken from penal law, did not adequately describe the different categories of wrongful acts under international law. His Government did not believe it was necessary to draft provisions on countermeasures, which could only be tolerated under international law as an extreme remedy to be taken only in exceptional cases.

94. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, his delegation was pleased that draft articles had been drawn up on the subject of prevention. Work on the conceptual clarification and identification of the rules on prevention should not be delayed. Any breach of those rules entailed international liability on the part of the State of origin for the unlawful act. It was important to clarify and establish the consequences under international law in cases where substantial transboundary damage was caused, even when the State of origin had complied with all the rules of prevention. Given the unique nature of the obligation to make reparation in such cases, the rules on reparation should embody certain principles supplementary to those governing liability for unlawful acts. In cases of liability in the strict sense, even full compliance with due diligence did not exempt a State from liability.

95. On the question of nationality in relation to succession of States, it was significant that the Commission had considered the possibility of including the question of the nationality of legal persons. With countries becoming more and more interdependent economically and the volume of investments growing, the time had come to rethink the traditional approach to the question. Argentina had signed

many bilateral agreements on promotion and reciprocal protection of investments which included criteria for defining the concept of "foreign legal person" in terms of the country of incorporation and the location of the company's main office. That represented a change in the traditional view that legal persons did not have nationality, only domicile. The Commission's work on that issue would undoubtedly contribute to the development of other topics as well, including diplomatic protection. On the question of the nationality of natural persons, it was worth recalling that the decolonization process had not ended, and there were still a number of cases in which the status of non-self-governing territories had not been resolved.

96. His delegation was following with interest the work of the Special Rapporteur on diplomatic protection. Codification of practice in that area could contribute greatly towards preventing conflicts between States. The topic of diplomatic protection could not be separated from the topic of State responsibility.

97. Turning to the topic of unilateral acts of States, he pointed out that such acts were a source of international law and needed to be properly defined. The Commission should not limit its study to a single category of unilateral acts, such as declarations, but should work on all the main categories of such acts. The plan for the study outlined in paragraph 210 of the Commission's report on its forty-ninth session (A/52/10) provided a suitable basis for work on codification of that topic.

98. With regard to reservations to treaties, his delegation was generally in agreement with the guidelines on the definition of reservations and interpretative declarations. It also agreed with the Special Rapporteur on the matter of so-called "reservations to bilateral treaties", which, in fact, were not reservations at all, but proposed amendments.

99. The Commission's future work should focus on continuing the systematization of the major issues of international law, particularly those which so far had only been considered in the writings of jurists or in judicial decisions.

100. In order for the codification exercise to be effective, its results should be embodied in multilateral conventions, as had been the case with the law of treaties and the law of diplomatic and consular relations. Because of the difficulties encountered in recent years in regard to the ratification of some multilateral conventions, the Commission seemed to have focused more on the formulation of principles, guidelines or model rules (soft law). Although that procedure was appropriate in some cases, the Commission should not lose sight of the fact that codification should be aimed at the

elaboration and systematization of customary rules in the form of legally binding international conventions. In that regard, the Commission should maintain close relations with the International Court of Justice, whose decisions and advisory opinions played a fundamental role in determining the existence of customary rules and developing the principles of international law. The Commission should also take into account the contributions to codification and doctrine made by regional bodies such as the Inter-American Juridical Committee.

101. His delegation hoped that the Commission would be able to complete its work on State responsibility at its next session. It would also like to see rapid progress on the topic of international liability for acts not prohibited by international law, and trusted that the Commission would make progress in its study of nationality and succession of States.

102. In conclusion, he wished to stress the importance of ensuring equitable representation of candidates from developing countries in the annual Geneva seminars. His delegation supported the allocation of the necessary budgetary funds for that purpose and welcomed the voluntary contributions that had been made.

The meeting rose at 1.15 p.m.



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Chairman: Ms. Flores Liera (Vice-Chairman) (Mexico)
later: Mr. Enkhsaikhan (Chairman) (Mongolia)

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In the absence of Mr. Enkhsaikhan (Mongolia), Ms. Flores Liera (Mexico), Vice-Chairman, took the Chair.

The meeting was called to order at 10.20 a.m.

Agenda item 154: Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization
(continued) (A/C.6/53/L.3)

1. **Mr. Herasymenko** (Ukraine), reintroducing draft resolution A/C.6/53/L.3 because his previous introduction, summarized in document A/C.6/53/SR.8, had not been mentioned in the *Journal of the United Nations*, No.1998/202, said that, while largely based on General Assembly resolution 52/162, the text took account of more recent developments such as the report of the Special Committee (A/53/33) and the Secretary-General's report (A/53/312). He hoped that the draft resolution, which was balanced and uncontroversial, would be adopted without a vote and expressed his willingness to engage in informal consultations on the proposal in paragraph 8 to establish a working group within the Sixth Committee.

Agenda item 150: Report of the International Law Commission on the work of its fiftieth session
(continued) (A/53/10 and Corr.1)

2. **Mr. Morshed** (Bangladesh) said that the draft articles on prevention of transboundary damage from hazardous activities contained in chapter IV of the Commission's report (A/53/10 and Corr.1) were remarkable, as was the speed with which the Special Rapporteur had accomplished his mandate. The emphasis on cooperation as the underlying principle of the regime of prevention was most welcome. The Commission's approach had been constructive and practical; he commended the institutionalization of notification and consultations, the identification of a balance of interests and the introduction of the idea of public consultation. The draft articles – the commentary to which was also admirable – constituted an elegant structure that could form the basis of codification.

3. Although the two-part approach adopted – the elaboration of a prevention regime separate from a liability regime – had proved a successful expedient, his delegation looked forward to the Commission's elaborating the basic principles of liability, thus removing some of the potential ambiguities to which the two-part approach might give rise.

4. The adoption of the principle of due diligence had certain implications. Due diligence had an objective element, traceable to the fact that hazardous activities carried, as it

were, the seeds of their own physical consequences, which could be foreseen with a degree of certitude and precision. In that sense, "result" defined the duty of care, even though that might be an "obligation of conduct".

5. His delegation also believed that considerations governing liability were not identical with those governing the measure of damages. In the Bhopal case, the point at issue had been not the operator's liability but the measure of damages. Higher limits of tolerance in developing countries did not argue a higher threshold of liability, only a possibly lower measure of damages. If a State permitted hazardous activities in its territory, it must be presumed to be able to take care of the potential consequences thereof. That presumption applied irrespective of the level of development of the State concerned. His delegation was confident that the Commission would, upon second reading, further clarify and strengthen the law.

6. **Mr. Sepulveda** (Mexico) commended the new format of the Commission's report; its volume had been reduced without sacrificing the quality of its content. With regard to the prevention of transboundary damage from hazardous activities, he said that the draft articles, which had been prepared with admirable speed, constituted a full and balanced document which would make for the early adoption of that part of the topic and swift progress to the consideration of liability proper. Prevention was indeed a most important concept and the rules contained in the draft articles were most useful. The emphasis on prevention should not, however, lead to a deviation from the original objectives. It was unsatisfactory, in that context, that the question of liability had been excluded in dealing with prevention, as indicated in paragraph 31 of the report. If the principle was adopted that non-compliance with duties of prevention in the absence of any damage actually occurring would not give rise to any liability, the effect would be to limit the scope of the duties contained in the draft articles and to separate the duties of prevention from the consequences of non-compliance with rules on prevention. The two were, however, inextricably linked, as the Commission itself had noted in paragraph 2 of the general commentary to the draft articles. That need to link cause and effect led his delegation to urge once again that the topic of prevention should be included in that of liability, since it could not accept that non-compliance could fail to give rise to liability even if no damage actually occurred. There were a number of reasons for that view. First, there was a risk of weakening obligations of conduct. If prevention was better than cure, it was essential to establish rules governing the consequences of non-compliance, whether or not damage occurred. Otherwise, the commitment to observe obligations

of conduct would be diminished and so, consequently, would be the effectiveness of the draft articles.

7. Another effect would be to separate questions that should be considered together. In determining the consequences of non-compliance, consideration should also be given to the effect when damage occurred. If the approach proposed by the Commission were adopted, would it then be possible to say that non-compliance constituted an aggravating factor if damage actually occurred? Whatever the reply to that question, his delegation believed that the liability aspects should be considered together when the second part of the topic was studied.

8. Separation also had the effect of determining the consequences of liability at a time when the Commission was meant to be dealing solely with prevention and thus distorted the decision taken at the forty-ninth session that the issues of prevention and liability should be dealt with separately.

9. His delegation would, in principle, like to see the draft text become a convention, since that was the only way of providing a solid enough basis for rules on hazardous activities. A model law or a framework convention would not carry the same weight. With regard to the dispute settlement procedure, his delegation believed that the nature of the topic was such as to make the inclusion of binding mechanisms absolutely essential. A fact-finding commission was an acceptable first step, but ultimately a complainant should be able to have recourse to the courts.

10. The precautionary principle had not been clearly incorporated in the draft articles. Since the point at issue was activities involving a risk of causing significant transboundary harm, the principle ought to be reflected in the text. The Commission had been right not to spell out specific hazardous activities in draft article 1, given the difficulty of making an exhaustive list and the speed of technological advance. His delegation queried, however, the decision to omit ultrahazardous activities. It was true that they were the subject of special regulation, but nonetheless the question should be reconsidered at the same time as the liability regime. Not all existing treaties on the matter provided for the liability of the State of origin.

11. With regard to the threshold of harm, although any wording involved a value judgement, the inclusion of activities involving the risk of causing "significant harm" provided some element of certainty; as the Commission had stated in its commentary to article 2, it signified something more than "detectable" but need not be at the level of "serious" or "substantial". "Significant" was the most appropriate term.

12. Article 3 was one of the cornerstones of the prevention regime. The importance of the obligation contained in that article was perhaps such that greater weight should be given to the obligation of due diligence. If the nature and scope of due diligence were determined precisely, the essence of the obligations imposed under the draft article could be defined.

13. His delegation attached particular importance to draft article 4, with its insistence on cooperation and good faith. Both principles were fundamental, but where they proved inadequate it was right that liability should be attributed to whoever caused the harm.

14. The time-frames mentioned in article 10, paragraph 2, and article 13, paragraph 2, were too vague. It would be preferable to lay down specific time limits – not to exceed six months – for States to provide notification.

15. He commended the Commission's approach on article 12, especially the fact that the factors involved in an equitable balance of interests had not been put in any particular order of priority, or included in an exhaustive list. There was, however, an unnecessary repetition, which could lead to confusion: harm to the environment, mentioned in draft article 12, subparagraph (c), was already covered by draft article 12, subparagraph (a).

16. It had been an extremely sensible decision to include the provisions of draft article 16, which would substantially reduce the possibility of disputes between States and facilitate the implementation of the draft articles.

17. With regard to diplomatic protection, he said that, although different opinions could exist on some aspects of the topic, the existing customary law should be adequate to guide the Commission's work. He recalled that for diplomatic protection to be invoked a national of the State making the claim had to have suffered harm. There also had to be evidence that such harm had occurred, that it was contrary to international law, that it was attributable to the country against which the claim was made and that there was a link of cause and effect between the harm caused and the attribution of harm. His delegation considered that the following points should be borne in mind, in addition to those listed in paragraph 108. First, diplomatic protection was a right of the State, which had total discretion. Any suggestion that the State was a mere intermediary went far beyond the sphere of codification of the law. Secondly, it was better to base discussions on secondary rules, so that the admissibility of claims and the preconditions for their submission could be studied. It was therefore important to lay greater emphasis on the rule regarding the exhaustion of domestic resources. That principle, which was a well-established rule of customary international law, should be

fully honoured in the draft articles, but did not seem to have been given due importance, despite its inclusion in a number of recent treaties. It would be particularly interesting to analyse the possible impact of the new dispute settlement procedures established in some international instruments which gave aliens direct access to foreign courts. The clearest example of that was in agreements on protection of investments. Such new rights for the individual which eliminated the role of the individual's own State had obvious repercussions for the traditional treatment of diplomatic protection. The effect could be bad as well as good, since it could give rise to inequality: whereas a foreigner had various avenues of recourse open to him, the national of a State might be able to resort only to his own domestic courts. The Commission should look into such developments and establish rules that would protect the whole range of rights and obligations, which had so many political implications.

18. Lastly, it was important to maintain a distinction between international human rights protection and diplomatic protection. Although they were obviously linked, they should not be assimilated and no hierarchy should be established between them. Diplomatic protection did not necessarily have any connection with human rights, since it often had to do with questions of inheritance or property. Similarly, human rights protection could be achieved without recourse to diplomatic protection. Moreover, juridical bodies for the protection of human rights, unlike those concerned with diplomatic protection, were well established in both the internal legal order and the international system; that was a matter that the Commission should consider.

19. **Mr. Patriota** (Brazil), relevant to chapter IV of the report, said his delegation agreed that a regime on prevention should be separated from a regime of damage liability; the importance of the issue warranted its further in-depth examination.

20. On the difficult matter of diplomatic protection, the Commission's approach was satisfactory. Under traditional doctrine, such protection could be exercised only where certain conditions were met, including the exhaustion of local remedies and compliance of the claimant's previous conduct with the so-called "clean hands" rule. Diplomatic protection pertained to the State, not the individual; recognition of the rights of the individual at the international level involved another strand of international law, and the distinction between the two concepts should not be blurred.

21. He was pleased to announce that the Fundação Alexandre de Gusmão had recently published, on behalf of the Government of Brazil, the complete series of the Gilberto Amado Memorial Lectures, presented in the languages in

which they had originally been delivered, to mark the Commission's fiftieth anniversary. The entire series would shortly be made available via the Internet.

22. **Mr. Choi** (Republic of Korea) said that while a preventive approach to the issue of transboundary damage from hazardous activities was commendable, the attempt to treat the issue of liability separately from that of prevention would involve a set of complex legal principles. The concept of an obligation based on due diligence rather than result embodied in draft article 3, left many questions unanswered. It was essential to strike a balance between the interests of the State of origin and those of the State or States likely to be affected, between developmental and environmental considerations, and between advanced and developing countries. In view of their very broad scope, the draft articles should form part of a framework convention rather than a convention or model law.

23. The title "Prevention of transboundary damage from hazardous activities" could be improved by inserting the word "potentially" before "hazardous", for in cases where transboundary damage was preventable, the activity should not necessarily be deemed hazardous. Issues of liability and State responsibility were involved, and the legal implications of the term "hazardous activities" might differ from those of the term "potentially hazardous activities".

24. **Mr. Raichev** (Bulgaria) said that the draft articles on prevention of transboundary damage from hazardous activities were generally satisfactory. The underlying obligation of due diligence was appropriate, and the emphasis on good faith and cooperation was commendable. However, draft article 3, which provided the basic foundation of the article, should deal not only with the obligation of States to take all necessary measures to prevent and minimize the risk of significant transboundary harm, but also with the closely related obligation to mitigate the effects of harm once it had occurred. The duty to prevent and minimize transboundary harm should be treated as an obligation of conduct or due diligence. Failure to comply with the general duty of prevention should entail State responsibility, civil liability, or, where a State of origin and an operator were simultaneously involved, both. The inclusion in draft article 7 of provisions requiring an authorizing State to ensure that an operator conformed to the requirements of the authorization was appropriate, as otherwise the rule of prior authorization would lose much of its practical effect. Articles 8 and 9, relating respectively to impact assessment and public consultation, were of great importance, in view of the potential implications of transboundary damage for life, health and property. His delegation supported the view that articles 10, 11 and 12

embodied a set of procedures that were essential to the establishment of an equitable balance of interests. The issue of dispute settlement, dealt with in draft article 17, could not be definitively resolved until the Commission had taken a decision on the final format of the draft articles. A detailed procedure for the appointment and functioning of the proposed fact-finding commission should be included.

25. **Mr. Baena Soares** (Chairman of the International Law Commission), introducing chapters VI, VIII and IX of the Commission's report, noted in connection with chapter VI, dealing with unilateral acts of States, that the Special Rapporteur for the topic had observed that rules of international law governing such acts could not be developed until the acts in question had been adequately defined. As a first step, it had been necessary to identify acts that fell outside the scope of the topic. Besides unilateral acts of a non-autonomous or dependent nature, which were governed by existing rules of international law, such acts included unilateral political acts, unilateral legal acts of international organizations, attitudes, acts and conduct of States which, though voluntary, were not performed with the intention of producing specific effects in international law, and unilateral acts of States which gave rise to international responsibility (a topic which the Commission was already considering). Other acts not falling within the scope of the topic were unilateral acts connected with the law of treaties (signature, ratification, the formulation of reservations and the like); acts which contributed to the formation of custom; acts which constituted the exercise of a power conferred by a treaty or a specific rule of customary law; acts which did not consist in the exercise of pre-existing legal powers but represented the exercise of a freedom under international law; and unilateral acts that created or gave rise to a treaty relationship. Estoppel likewise was not of direct concern to the study of unilateral acts, as in that case the legal effect flowed not from the will of the State making the representation, but from the reliance placed on that representation by the State to which it was made. Certain other forms of conduct were also excluded from consideration, such as silence and notification, which in order to generate effects in international law necessarily presupposed the performance of an act by another State or some other subject of international law.

26. The Special Rapporteur considered that in order for a legal act to be strictly unilateral in nature, that act had to be autonomous, i.e., it had to produce legal effects independently of any other manifestation of will, whether prior, simultaneous or subsequent, by some other subject of international law. The Special Rapporteur held that the legal basis of the binding nature of unilateral acts of States rested

with the principle of good faith in international relations and the power of auto-limitation which States enjoyed under international law.

27. On the basis of the above considerations, the Special Rapporteur had proposed the definition of a strictly unilateral declaration contained in paragraph 142 of the Commission's report. As the Special Rapporteur had emphasized, that definition was limited to unilateral declarations. Other forms of unilateral acts were excluded, since the unilateral declaration was the basic instrument which States employed in order to accomplish the transactions which they chose to effect by means of unilateral acts. According to the Special Rapporteur, then, the Commission should focus on the unilateral acts as formal legal acts, i.e., as procedures or devices for the creation of legal rules, and in particular for the creation of legal obligations for the States that were their authors, regardless of the content of the act.

28. The commission had discussed various aspects of the topic (paras. 151 to 191 of the report), and had finally decided to reconvene the Working Group on Unilateral Acts of States. The Working Group's recommendations had been endorsed by the Commission and were contained in paragraphs 194 to 201 of the report.

29. With respect to the scope of the topic, there had been general endorsement of the Special Rapporteur's view that it should be limited to unilateral acts of States issued for the purpose of producing international legal effects, to the exclusion of acts of States which did not produce legal effects, unilateral acts of States which were linked to a specific legal regime, and acts of other subjects of international law, such as international organizations. There had been some divergence of opinion as to whether the scope of the topic extended to unilateral acts of States in respect of subjects of international law other than States or *erga omnes*, and whether the effects of unilateral acts issued in respect of States could also be extended to other subjects of international law. It had been felt, however, that at the current stage work could proceed even in the absence of a final decision on the matter.

30. As to the form which the Commission's work on the topic should take, it had generally been felt that the elaboration of draft articles with commentaries was the most appropriate way to proceed. As noted in paragraph 197 of the report, the Commission considered that the Special Rapporteur might already be in a position to produce three draft articles: one dealing with scope, another dealing with use of terms, and a third providing that the fact that the draft articles did not apply to unilateral acts of the State which

were linked to a pre-existing international agreement was without prejudice to the application to them of any of the rules set forth in the draft articles to which they would be subject under international law, independently of the draft articles. Another section of the draft articles could cover the study of possible effects of the act and the question whether it would be necessary, in order for the act to produce legal effects, for the addressee to accept it or subsequently behave in such a way as to signify such acceptance. It had likewise been suggested that the Special Rapporteur should examine the question of estoppel and the question of silence. The Commission had also asked the Special Rapporteur to proceed further with the examination of the topic, focusing on aspects concerning the elaboration and conditions of validity of the unilateral acts of States, including the question concerning the organs competent to commit the State unilaterally on an international plane and the question concerning possible grounds of invalidity concerning the expression of the will of the State.

31. The Commission would particularly welcome the Sixth Committee's views on whether the scope of the topic should be limited to declarations, as proposed by the Special Rapporteur or should also encompass other unilateral expressions of the will of the State, and on whether the topic's scope should be limited to unilateral acts of States issued to other States or should also extend to unilateral acts of States issued to other subjects of international law.

32. Turning to chapter VIII, dealing with the topic of nationality in relation to the succession of States, he recalled that at its forty-ninth session, the Commission had adopted on first reading a set of draft articles on the first part of the topic, i.e., the question of the nationality of natural persons, which had been submitted to Governments for comments and observations. In paragraph 40 of the current report, the Commission reiterated its request to Governments for their views on the draft articles, so as to enable it to begin the second reading at its next session.

33. The Special Rapporteur had felt that a preliminary exchange of views at the fiftieth session of the Commission on possible approaches to the second part of the topic, namely the nationality of legal persons, would facilitate the future decisions to be taken by the Commission on the question. In his fourth report, the Special Rapporteur had therefore raised a number of questions concerning the orientation to be given to the work on the nationality of legal persons. The Commission had established a working group to consider the matter; its preliminary conclusions were set out in paragraphs 460 to 468 of the Commission's report. Bearing in mind those conclusions, the Commission would further need to decide which categories of "legal persons"

should be covered by the study, to which legal relations the study should be limited and what could be the possible outcome of the work of the Commission on that part of the topic. It was very important for the Commission to have the views of States on that matter. Indeed, as indicated in paragraph 468 of the report, in the absence of any positive comments from States, the Commission would have to conclude that States were not interested in the study of the second part of the topic. He therefore appealed to the Committee to provide appropriate guidance to the Commission on that issue.

34. With regard to chapter IX concerning reservations to treaties, the Commission had adopted seven draft guidelines, accompanied by commentaries, on various questions pertaining to the wider issue of the definition of reservations and interpretative declarations. The starting point of the definition of reservations was found in article 2, paragraph 1 (d), of the 1969 Vienna Convention on the Law of Treaties. The next two Vienna Conventions, on State succession in respect of treaties and on the law of treaties concluded by international organizations, had also contributed to the completion of the original definition. A composite text (the Vienna definition) combining all those contributions therefore appeared at the beginning of chapter I of the Guide to Practice as draft guideline 1.1 "Definition of reservations". The substantive element of the definition was teleological in nature, since a reservation purported to exclude or modify the legal effect of certain provisions of the treaty in their application to the State or international organization concerned. That element, however, presented several technical problems, the first set of which referred to the expression "certain provisions", which was addressed by guideline 1.1.1.

35. Draft guideline 1.1.1 in fact reflected the practice of "transverse" or "across-the-board" reservations, which related not to any particular provision but, for example, to the way by which a State or an international organization intended to implement the treaty as a whole. The draft guideline purported to remove any ambiguity and to avoid any controversy by establishing the broad interpretation that States actually gave to the apparently restrictive formula of the Vienna definition. Such precision in no way prejudged the admissibility or inadmissibility of general and imprecise reservations.

36. Draft guideline 1.1.2 sought to remedy a flaw in the wording of the 1969 and 1986 Vienna Conventions. The spirit of the provision was that a State or an international organization could formulate or confirm a reservation when it expressed its consent to be bound by the treaty.

37. Draft guideline 1.1.3 concerned unilateral statements by which a State purported to exclude the application of a treaty in whole or in part in respect of one or more territories under its jurisdiction; such statements constituted reservations within the meaning of the Vienna definition. While draft guideline 1.1.3 dealt with the scope *ratione loci* of certain reservations, draft guideline 1.1.4 dealt with the time factors of the definition, i.e., the moment at which certain "territorial reservations" could be made.

38. Draft guideline 1.1.7 addressed the issue of reservations formulated jointly by a number of States or international organizations. The possibility of joint reservations might arise in the future and the Commission had felt that it would be wise to anticipate that possibility in the Guide to Practice. The proliferation of common markets and economic unions made that possibility all the more likely.

39. The last draft guideline, which had been adopted without a title or number for the time being, had seemed necessary in order to clarify that the admissibility and effects of reservations were not otherwise affected by the definition, which did not prejudice the validity of statements defined as reservations.

40. Two other draft guidelines had given rise to a rich debate in the Commission and would be considered at its next session. The Commission would be grateful to have the comments and observations of States on those two guidelines, which concerned the problem of "extensive reservations". The issue had two aspects. The first concerned unilateral statements designed to increase the obligations or rights of the author beyond those stipulated by the treaty itself. The question was whether such statements should be considered as reservations. The second aspect related to statements purporting to limit not only the obligations imposed upon the author by the treaty but also the rights created by the treaty for the other parties.

41. Another draft guideline under consideration was the one concerning reservations relating to non-recognition. The Special Rapporteur had divided such statements into two categories: the first included general statements of non-recognition made on the occasion of the signature or the expression of consent to be bound by the treaty, and did not constitute reservations. The second category was more ambiguous, since it included statements by which the author did not accept any contractual relation with the entity it did not recognize. At the conclusion of the debate on that draft guideline, the Special Rapporteur had been inclined to consider that if such statements were not actually reservations, they could be thought of as statements similar

to declarations of general policy which apparently did not produce legal effects on its application.

42. The Commission had also considered the definition of interpretative declarations, as well as the distinction between reservations and interpretative declarations. The Special Rapporteur had proposed a positive definition of interpretative declarations containing elements that were common to reservations and to interpretative declarations. In addition to declarations of general policy and informative declarations, the Special Rapporteur had mentioned another category, that of conditional interpretative declarations by which the consent of the author to be bound by a treaty was subordinated to its own interpretation and which were very close to reservations. The method of distinguishing between reservations and interpretative declarations could follow the model set out in articles 31 and 32 of the Vienna Convention on the Law of Treaties, containing the general rule of interpretation of treaties.

43. In conclusion, he reiterated the Commission's request for comments on the question of "extensive reservations", i.e., on whether unilateral statements by which a State purported to increase its commitments or its rights in the context of a treaty beyond those stipulated by the treaty itself would or would not be considered as reservations, as well as any information on existing relevant State practice.

44. **Ms. Hallum** (New Zealand) said her delegation noted with satisfaction that the Commission had adopted on first reading 17 draft articles on prevention of transboundary damage from hazardous activities. Nevertheless, it felt that principles concerning prevention could not be determined in isolation from the principles concerning liability. While prevention of transboundary harm was, of course, very important, it was important to be realistic and also have a regime which dealt adequately with the consequences of harm when it nonetheless occurred. Her delegation urged the General Assembly and the Commission to reconsider the decision to pursue the two aspects of the topic separately. The basic assumption of the topic, that the competing rights and interests of States were best adjusted without the need to determine wrongfulness, required primary rules of liability to be formulated in conjunction with primary rules of prevention.

45. As the Secretariat's valuable survey of liability regimes showed, developing State practice since the Commission had first taken up the topic had confirmed that that assumption was fully justified. By considering liability regimes in conjunction with prevention regimes, States had the opportunity to tailor both regimes to the nature and extent of the risk of a particular activity, whether

transboundary harm resulted from a failure to take the agreed prevention measures or from the fact that the measures had turned out to be inadequate.

46. Referring to the questions raised by the Commission in paragraphs 31 to 34 of its report, she noted that the Commission had asked what kind of regime should apply to activities which actually caused significant harm. Clearly, a liability regime was required, because the natural corollary of a prevention regime to deal with the risk of harm was a liability regime to deal with any actual harm which might nonetheless occur. Her delegation urged the Commission to remain seized of the liability aspects of the topic, and of the inherent linkages between those aspects and prevention.

47. Secondly, the Commission had asked about the type of consequences that were appropriate or applicable following failure to comply with the duties of prevention of transboundary damage. It was well settled that a breach of a State's obligation to use due diligence not to cause harm to other States was an internationally wrongful act. To the extent that the draft articles on prevention codified that obligation, their breach must give rise to State responsibility for wrongfulness. To the extent that they represented the progressive development of international law through more detailed obligations assumed by treaty, a breach of the rules of prevention which caused harm to the nationals or territory of other States must also engage the secondary rules of State responsibility. That was so, whether or not the rules of prevention were accompanied by rules of liability.

48. Breaches of the primary rules of prevention which did not cause actual harm, or could not be shown to have a causal connection with any actual harm suffered, but which, for example, wrongfully exposed other States to risk of harm, must also engage State responsibility. However, one would expect the forms of that responsibility to be different in scale and in kind if harm had not actually occurred, or had occurred, but could not be shown to have been caused by the breach.

49. With respect to the form which the draft articles would take, her delegation was in favour of incorporating articles on both prevention and liability in a convention which would lay down residual rules of international law but allow States, by mutual agreement, to add or substitute more detailed regimes to govern particular activities.

50. Her delegation considered that since dispute settlement procedures would be covered by the draft articles on State responsibility, they need not be included in those which dealt with prevention and liability. However, failure to achieve acceptable solutions as a result of consultations (art. 11) should not be regarded as a dispute concerning interpretation

or application (art. 17, para. 1). In such cases, it might be useful to appoint a fact-finding commission (art. 17, para. 2).

51. In closing, she reiterated her delegation's position that prevention and liability were a continuum which began with the duty to assess the risk of significant transboundary harm and ended with the obligation to ensure compensation if such harm occurred. The set of draft articles on liability included in the Commission's 1996 report (A/51/10, Annex I) showed that the concept could be accommodated under international law and should allay the fears of States which had opposed its codification and development.

52. **Mr. Abraham** (France), referring to chapter VI, said that his delegation supported the Commission's decision to limit the topic to unilateral acts of States performed with the intention of producing effects in international law and to begin by establishing a clear definition of such acts by excluding those which were not relevant to the topic. Unilateral acts of international organizations should be the subject of a separate study. Unilateral political acts should also be excluded, although it was not always easy to determine whether a given act was legal or political in nature; international courts had often made that determination on the basis of the intention of the State, and the consequences of the act, in question. Unilateral acts connected with the law of treaties should likewise be excluded.

53. However, he did not agree with the Special Rapporteur's proposal to exclude unilateral acts which gave rise to international responsibility. It was true that the Commission was engaged in a specific study of State responsibility, but the question of whether, and to what extent, a unilateral act might entail State responsibility was of great interest; for example, he wondered whether a State could be held responsible for failing to follow through on a unilateral act which had established a right to the benefit of another State. There was an interesting parallel with the law of treaties; article 37, paragraph 2, of the Vienna Convention on the Law of Treaties stated that when a treaty created a right for a third State, that right could not be revoked or modified by the parties if it was established that it was intended not to be revocable or subject to modification without that State's consent. It might, then, be considered, *mutatis mutandis*, that if a unilateral act, such as a declaration, was clearly intended to create a right for a third party, the author State could not unilaterally revoke it and, if it did so, it would incur responsibility. Such questions fell logically within the scope of the Commission's study.

54. He did not think that silence could be viewed as a unilateral act, even though it could be considered a sign of a State's intention to assume legal obligations or to accept a legal situation. He also doubted that unilateral statements made by the agent of a State in the course of proceedings before an international court or tribunal could be considered to be unilateral acts of the State. He looked forward to the Special Rapporteur's comments on those matters.

55. It was important to prevent the scope of the topic from becoming too broad or narrow and to stress the criteria for a unilateral legal act, which must produce legal effects in respect of subjects of international law which had not participated in its performance and must generate legal consequences independently of the manifestation of the will of some other subject of international law. His delegation also considered that the obligatory nature of such an act was dependent on the intention of the State which performed it rather than on another State's legal interest in compliance with the obligations it created.

56. The Commission's definition of a unilateral act as an autonomous [unequivocal] and notorious expression of the will of a State which produced international legal effects provided an interesting basis for further work. The primary question was whether the act of the State had been intended to produce legal effects vis-à-vis one or more other States which had not participated in its performance and whether it would produce such effects if those States did not accept its consequences, either explicitly, or as implied by their subsequent behaviour.

57. While it was too soon to decide whether the scope of the topic should be limited to unilateral acts of States issued to other States, or should also extend to unilateral acts of States issued to other subjects of international law, he thought that the Commission should take into account all possible beneficiaries of unilateral acts. It should also consider the role of unilateral acts of States in the development of customary law. In his opinion, it was far too soon to decide what form the results of the Commission's work should take.

58. The question of nationality in relation to the succession of States, while interesting, was complicated by the variations in treaty law, the lack of clarity in customary law, the paucity of precedent and the fact that rules varied according to the type of State succession involved. Nevertheless, the draft articles would be a useful complement to the 1978 Vienna Convention on Succession of States in respect of Treaties and the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts.

59. The draft articles had been prompted by the need to prevent cases of statelessness or multiple nationality as a result of State succession and to ensure that individuals were, to a certain extent, free to choose their nationality in such cases. However, he had reservations concerning certain assumptions made in the draft articles. It was important not to over-regulate States. In particular, it must be determined whether an individual's exercise of the right of option to retain the nationality of a predecessor State obliged the State to repatriate that individual and whether exercise of the right of option to assume the nationality of a successor State entailed automatic renunciation of the nationality of origin. In that regard, the stipulation in article 10, paragraph 4, that when persons entitled to the right of option had exercised such right, the State whose nationality they had renounced would withdraw its nationality from such persons unless they would thereby become stateless was excessively restrictive; that provision should be amended to read that the State whose nationality such persons had renounced could withdraw its nationality from such persons only if they would not thereby become stateless.

60. The draft articles established an inappropriate link between the question of nationality and that of human rights. They also overemphasized the principle of effectivity which had no basis in international law. He took particular exception to article 18, paragraph 1, which appeared to authorize any State to contest another State's granting of nationality. While it was true that the International Court of Justice had made a similar ruling in the 1955 *Nottebohm* case, that decision had been criticized and was, moreover, an isolated example. Draft article 18, paragraph 1, appeared to create an unfortunate extension of the principle of effectivity and to assume that States attributed their nationality under public international law, whereas in practice, the reverse was the case.

61. The draft articles also implied that individuals had the right to free choice in the matter of nationality. Such was not the case, and the rights of States should not be reduced excessively to the benefit of individual rights. Draft article 20, if adopted, would create an imbalance between the two categories of rights. States must retain control over the attribution of nationality. Furthermore, article 11 ("Unity of a family") appeared to have significant implications for the right of residence, which was not the subject of the draft articles, and article 13 ("Status of habitual residents") was more closely related to the rights of non-nationals in State succession than to the subject of the draft.

62. With respect to the final form of the draft, his delegation did not wish to exclude the possibility of a convention since the purpose of the draft articles was to alter

certain rules of customary origins already being applied by States.

63. Before embarking on a study of the nationality of legal persons, the Commission should endeavour to clarify the concept of such persons in international law; recent negotiations on the statute of the International Criminal Court had shown the difficulty of achieving consensus on that concept. It might be best for the Commission to first undertake a study of legal persons in general, then to deal with the question of their nationality and only then to consider the question of that nationality in relation to State succession. Such a procedure would be quite different from that which the Commission had initially proposed, but it was a far more logical one.

64. With respect to reservations to treaties, he supported the Commission's decision to make no change in the relevant provisions of the 1969 Vienna Convention but rather to fill the gaps in that instrument.

65. Concerning the guidelines the Commission had adopted at its 1998 session, he noted that the French word "*directive*" was not an appropriate translation of the English word "guidelines" and should be replaced by "*lignes directrices*".

66. It was true that none of the three Vienna Conventions gave a comprehensive definition of reservations. His delegation considered that "reservation" meant a unilateral written act or statement made by a State or international organization when expressing its consent to be bound by a treaty, the purpose of which was to exclude or to modify the legal effect of certain provisions of the treaty. In that regard, it might be better to replace the verb "modify" with "restrict" or "limit" since, in such cases, the modification of legal effect was necessarily restrictive in nature. In order to avoid confusion, it might also be better to deal with States and international organizations in separate paragraphs. It was important to avoid giving States and international organizations complete freedom as to the moment when they formulated reservations, since that could introduce legal uncertainty into treaty relations. It was therefore essential to establish a comprehensive list of the moments at which reservations could be made.

67. With regard to the object of reservations, they could be intended to limit or sometimes even exclude the legal effect of certain provisions of a treaty. He agreed with the wording of the relevant guideline (1.1.1). Reservations could be general in scope in that they did not relate solely to one or more specific provisions of a treaty, but if a reservation was too general it would call in question the commitment and good faith of the reserving State and its will to

implement the treaty effectively. General reservations gave rise to the most difficulties and had become more common in recent years, especially in the domain of human rights.

68. Draft guideline 1.1.2 gave rise to no particular difficulties. With regard to draft guideline 1.1.3, he agreed with the Special Rapporteur that a unilateral statement by which a State purported to exclude the application of a treaty or some of its provisions to a territory to which that treaty would be applicable in the absence of such a statement, constituted a reservation. In the absence of such a reservation, the treaty should be considered applicable to the entire territory of the State in question under article 29 of the 1969 Vienna Convention on the Law of Treaties; however, that article did not prevent States from limiting the territorial application of a treaty, nor did it prejudice the question of the legal characterization of the statement made by the State in that connection. He did not agree with the members of the Commission who had considered that a territorial reservation could be formulated only if expressly provided for in the treaty to which it related. Article 29 of the Vienna Convention should not be interpreted too restrictively; while the Commission's discussion of that article at its 1998 session had been interesting, it was unrelated to the definition of reservations as such.

69. Concerning the question raised in paragraph 41 of the report, he did not think that unilateral statements by which a State purported to increase its commitments beyond those stipulated by a treaty could be considered reservations. However, the situation was somewhat different in the case of a State which, through a unilateral statement, sought to increase its rights under a treaty, a possibility not covered by the 1969 Vienna Convention. It was important to distinguish between treaty law and customary law; a State could not modify customary international law to its own benefit by formulating a reservation to a treaty codifying that law but in the case of treaty law, it might be possible for it to do so. The Commission might consider both that question and the options available to other States parties to a treaty which might wish to contest such a situation. Nevertheless, the term "reservation" was not appropriate in such situations, particularly since to so define the acts in question would have serious consequences for States whose silence would be considered to constitute acceptance after a certain period of time, as was the case with reservations.

70. Lastly, it was important to remember that the definition of a unilateral statement as a reservation did not render it admissible or valid; however, only when such a definition had been established could the question of the act's validity be settled, taking into account its legal scope and effect.

71. **Mr. Chimimba** (Malawi), referring to chapter IV, said that while the narrowing of the topic had helped to make it more manageable, some theoretical and practical problems remained, raising doubts as to the relevance of the topic. Draft article 6, while important in underlining the residual character of the draft articles, did not seem to be informative, particularly when read in conjunction with draft article 1. In its report on the work of its thirty-ninth session (A/42/10), the Commission had noted that: "Contrary to State responsibility, international liability rules were primary rules, for they established an obligation and came into play not when the obligation had been violated, but when the condition that triggered that same obligation had arisen". A restatement of that pertinent distinction in the commentary might be useful. In addition, while his delegation appreciated the Commission's preference not to spell out at the current stage the activities to which the draft articles applied, it was possible that a list of such activities and a final review of the main title of the topic, which continued to be misleading, could prove useful in resolving the lingering conceptual difficulties.

72. His delegation noted with appreciation that the draft articles gave effect to six important elements necessary for any regime based on prevention, namely: prior authorization; impact assessment, including of pre-existing activities; notification and information; consultations, based on an equitable balance of interests; the principle of unilateral preventive measures, and an appropriate standard, that of due diligence. His delegation would study the draft articles in order to ascertain that the proper balance had been struck. It was worth noting, however, that while assistance was implicit in the provisions dealing with cooperation, it merited separate treatment.

73. It might be necessary to explore further the question of an equitable balance of interests in order to assess its relationship to the draft articles on liability. Consideration of that question might be helpful in determining remedies that could be appropriate and complementary to the traditional remedies under the regime of State responsibility.

74. His delegation reserved its position for the time being on the form that the draft articles should take and on the dispute settlement procedure that would be most suitable. Nevertheless, in view of the residual character of the draft articles, the model-law option appeared to be unsuitable. In addition, it might be useful to make more explicit the residual and non-executory nature of the dispute settlement clauses, leaving the further elaboration of the appropriate mechanisms to be placed in an annex.

75. Turning to chapter V, he welcomed the Commission's intention to complete the first reading of the topic by the end of the current quinquennium. The topic was ripe for codification, with the *Mavrommatis Palestine Concessions* case as a useful point of departure. His delegation agreed with the Working Group that the customary-law approach had formed the basis of the topic. The recognition that any contemporary study of the topic should take into account the evolution of human rights law was very logical and relevant. In practice, there were many similarities in the espousal of claims under the two regimes, and a study of such an impact might prove worthwhile.

76. Lastly, his delegation found the possibility of extending the topic to situations where nationals of a State suffered as a result of an internationally wrongful act committed against them in their own State to be worth pursuing.

77. **Mr. Beránek** (Czech Republic), referring to chapter IX, said that for the purposes of the Guide to Practice, guideline 1.1 (Definition of reservations), which combined all the elements of the definitions contained in the three Vienna Conventions of 1969, 1978 and 1986, was satisfactory. Its main purpose was to draw a clear distinction between reservations and unilateral statements. The first difficulty in that regard arose in guideline 1.1.1 (Object of reservations), which provided that a reservation might relate "to the way in which a State, or an international organization, intends to apply the treaty as a whole". His delegation endorsed the Commission's intention to re-examine that guideline in the light of the discussion on interpretative declarations. As currently drafted, the text was too vague and did not provide a reliable criterion that would enable States to distinguish clearly so-called across-the-board reservations from interpretative declarations.

78. Contrary to the Commission's commentary to guideline 1.1.1, his delegation did not share the criticism concerning the use of the word "provisions" in the Vienna definition. The view that the intention behind the reservation was not to eliminate a "provision" but an "obligation" might not be entirely correct. In fact, reservations mostly eliminated precisely the application of "provisions". Whether the reserving State would be an obligated or an entitled State, should the provisions be applicable, might not be fully evident at the moment when the reservation was made. For example, provisions on the privileges and immunities of diplomatic or consular agents worked both ways.

79. The reasons given by the Special Rapporteur for refining the three formal components of the Vienna

definition, as set out in paragraph 495 of the report, were convincing and the conclusions adopted by the Commission were acceptable.

80. Concerning guideline 1.1.2 (Instances in which reservations may be formulated), his delegation agreed that it must include all situations envisaged in article 11 of the 1969 Vienna Convention. The fact that some elements of article 11 were not explicitly referred to in the definition of reservations contained in that Convention could not be interpreted as excluding the possibility of making reservations on such occasions. His delegation agreed with the interpretation that guideline 1.1.2 focused on the link between the definition of reservations and article 11 of the Convention, and that the purpose was not to provide an exhaustive enumeration of all moments at which reservations could be made. As indicated in paragraph (10) of the Commission's commentary to the guideline, other instances to which the definition made reference, such as notification of succession, would be examined by the Commission at a later date.

81. With regard to notification of succession, his delegation noted that the right of a successor State to make reservations in respect of multilateral treaties to which the predecessor State was a party could not be accepted as granted in all cases of succession of States. It must be limited to situations where the devolution of the treaty to the successor State did not operate automatically, in other words, where the notification of succession in respect of the treaty in question had a constitutive, not a declaratory, character. The distinction between those two situations emerged clearly from a comparison of the practice of newly independent States created by decolonization and those States which had come into being through the dissolution of a State. While the first case was covered by the "clean-slate" rule, the second situation was governed by the rule of automatic succession. Newly independent States which became parties to many multilateral treaties by means of notification of succession often formulated new reservations. On the other hand, once there was an automatic succession, the successor State became a party to a treaty modified, as the case might be, by the reservation of its predecessor. It did not, however, have the right to make new reservations. Even if there was a notification, its function was different from that of notification of succession of newly independent States. That interpretation was also based on the provisions of the 1978 Vienna Convention and the relevant commentaries of the Commission. Accordingly, following the dissolution of Czechoslovakia, neither his country nor Slovakia had made a single reservation to any treaty to which they had become parties through succession.

82. The Commission's commentary to guideline 1.1.3 (Reservations having territorial scope) contained convincing arguments in support of reservations of that kind. While that category of reservation was not explicitly covered by the definitions in the Vienna Conventions, the Commission appeared to infer the possibility of such reservations from article 29 of the 1969 Vienna Convention. Guideline 1.1.3, however, called for careful examination of the question of the instance in which that kind of reservation could be made. While classic examples of reservations of that kind had been made on occasions referred to in article 11 of the 1969 Vienna Convention, such as when the State gave its consent to be bound by the treaty, it should be kept in mind that the main field in which the rule of "movable treaty frontiers" applied was that of territorial cessions. Those situations were covered by article 15 of the 1978 Vienna Convention on Succession of States in respect of Treaties. Nothing in that article, however, made it possible to conclude that the State acquiring the territory had, on that occasion, the right to exclude the application of the treaty in the newly acquired territory by means of a reservation having territorial scope. Moreover, abundant State practice gave no support to the idea of reservations aimed at excluding the application of the rule of movable treaty frontiers. His delegation therefore failed to understand how the application of the principle of movable treaty frontiers within and outside the context of succession of States could lead to opposite conclusions as far as the possibility of making reservations having territorial scope was concerned. That question should be left to the Commission for further consideration when it addressed the question of reservations in situations of State succession and their permissibility in general.

83. Guideline 1.1.4 (Reservations formulated when notifying territorial application) raised a similar problem. It followed from the wording of the guideline that the unilateral statement aimed at excluding or modifying the legal effect of the treaty, made on the occasion of the notification of the expansion of the application of the treaty to the territory in question, was a reservation. While it was not the moment to discuss whether and under what conditions such a reservation was permissible, the Commission should, when it reached that stage of the debate, clarify whether a reservation of that kind would also be permissible if the expansion of the territorial application of the treaty was automatic, without the need for notification, as it was in the case of a transfer of part of a territory between two States.

84. Lastly, with regard to guideline 1.1.7 (Reservations formulated jointly), his delegation shared the Commission's view that the universal character of the reservation did not

exclude the possibility for States to formulate reservations jointly if they wished to do so. The warning against an unduly formalistic approach to the "unilateralism" of reservations was pertinent in that regard.

85. **Mr. Jayaratnam** (Singapore), referring to chapter IV, said that his delegation welcomed the Commission's decision to focus its study of international liability for injurious consequences arising out of acts not prohibited by international law on the prevention of transboundary harm.

86. Turning to chapter V, he observed that the Working Group had agreed that the customary law applicable to diplomatic protection would form the basis for the Commission's work. His delegation suggested that the Commission should consider the relationship between customary international law and the provisions of any applicable treaty enforced between the so-called "wrongdoing" and "injured" States. If a treaty conferred certain rights or afforded certain remedies only to the injured State or its nationals, the question arose as to whether that State would be barred from having recourse to other remedies under the general customary international law on diplomatic protection.

87. His delegation noted that the Working Group had, after debate, agreed that the exercise of diplomatic protection was the prerogative of a State, to be exercised at its discretion. The efficacy of diplomatic protection might depend in practice on the relative power of the wrongdoing and injured States. It was important, therefore, for the Commission to consider what safeguards should exist to prevent abuse of the right of diplomatic protection.

88. The issue of the standard of treatment that should be afforded to aliens was another important issue. According to the Commission's report, it had been asked whether the result of diplomatic protection was that an alien enjoyed more rights than the national of the offending State. It had also been asked if the standard of treatment should be defined by the domestic law of the offending State. Those were important issues requiring clarification. A related issue was the obligation of a foreign national to respect the laws of the host country.

89. **Mr. Benítez Saénz** (Uruguay), referring to chapter IV, said that the current version of the draft articles on international liability was an improvement over the previous version because they placed special emphasis on the prevention of damage. His delegation deemed that to be essential, as the legal interest requiring protection was, first and foremost, the environment, and its preservation should be a paramount consideration in the draft articles. That approach was consistent with the principles of the Stockholm

Declaration, the Rio Declaration on Environment and Development and United Nations resolutions, and should continue to be reflected in any new rules incorporated into international law. In that connection, the statement made at a previous meeting by the representative of Chile concerning the possibility of establishing a high commissioner for the environment was of great interest.

90. His delegation believed that it was appropriate not to limit the scope of application of the draft articles to a list of activities, but to refer more broadly to activities not prohibited by international law, as that would make it possible to include activities as yet unknown. It was also a good idea not to limit the scope of application to the territory of the State which caused the damage, but to refer instead to activities within the jurisdiction or control of a State, which could include activities in outer space, on the high seas or the continental shelf, or in the exclusive economic zone of a State.

91. The inclusion in the definition of activities to which the draft articles applied of the concepts of risk, damage and significant harm made good sense, as they ensured an adequate balance between the sovereign interests of States in carrying out activities not prohibited by international law and the legitimate concern that some activities could cause harm to third States. His delegation agreed with the Commission's statement in paragraph (4) of its commentary to draft article 2 that "significant" was something more than "detectable" but need not be at the level of "serious" or "substantial", and that the damage must be assessed on a case-by-case basis. Furthermore, the assessment of transboundary damage should not be limited to the territory of the State which was the victim of the damage, but should include any other territory within its jurisdiction, such as the exclusive economic zone or the continental shelf.

92. The formulation of the principle of prevention as set out in draft article 3 was sufficiently clear and consistent with the principles of environmental law. In accordance with recent court decisions, due diligence should be interpreted as including the obligation of the State to take appropriate legislative and regulatory measures to minimize the risk inherent in certain activities.

93. His delegation was of the view that the principle of strict liability should apply and that, even in cases where the State which caused the damage had taken appropriate measures, that did not exempt it from liability.

94. Since the interest requiring protection was the preservation of the environment, his delegation deemed it appropriate that States should provide the population which might be affected by an activity covered by the draft articles

with relevant information on the risk entailed by that activity.

95. Turning to chapter V, he said that the scope of the topic must be clearly defined. In principle, diplomatic protection should be limited to so-called indirect damage, in other words, the damage sustained by a natural or legal person represented by a State. The damage sustained by States and not by their nationals was regulated by other rules of international law. It was also important to adopt the principle of exhaustion of local remedies as a prerequisite for triggering the diplomatic protection mechanism.

96. His delegation endorsed the view that diplomatic protection was a prerogative of the State as a subject of international law.

97. With regard to the alleged link between human rights and diplomatic protection, his delegation shared the views expressed by other delegations as to the complete autonomy of the two concepts.

98. Lastly, with regard to chapter VI, his delegation shared the concern that, if unilateral acts of international organizations were to be studied, such a study should be limited to formal legal acts.

The meeting rose at 1.15 p.m.

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Chairman: Mr. Mochochoko (Lesotho)

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Agenda item 150: Report of the International Law Commission on the work of its
fiftieth session (*continued*)

The meeting was called to order at 3.15 p.m.

Agenda item 150: Report of the International Law Commission on the work of its fiftieth session

(continued) (A/53/10 and Corr.1)

1. **Mr. Magnuson** (Sweden), speaking on behalf of the Nordic countries — Denmark, Finland, Iceland, Norway and Sweden — and referring to the issue of international liability for injurious consequences arising out of acts not prohibited by international law (A/53/10, chap. IV), said that the Nordic countries noted with satisfaction the work done by the Commission during its fiftieth session on the prevention of transboundary damage from hazardous activities. The draft articles reflected basic principles of international environmental law as it had developed, from the 1972 Stockholm Conference to the Rio Declaration on Environment and Development. Understandably, the approach taken by the Commission was a cautious one, leaving out for the time being the question of compensation for harm caused, given the complexity of the issue and the widely disparate views expressed in the debates of the Sixth Committee. It remained, however, the view of the Nordic countries that a future international legal instrument should cover both the issue of prevention of transboundary harm and the duty to pay compensation for harm caused.

2. The Nordic countries had commented earlier on the issue of prevention, and he recalled their intervention in the Committee on 11 November 1996. They stressed their view that the issue of prevention was not only relevant to activities involving risk, namely hazardous activities, but also involved the obligation to minimize the adverse effects from such activities and from accidents. They therefore regretted that article 1 (b) of the draft text had been deleted, limiting the scope of the text to hazardous activities.

3. The time had come for the Commission to deal with the question of liability and, in that regard, the need for effective compensation to the innocent victim must be a guiding principle in the elaboration of those articles. The Nordic countries had a flexible approach regarding the nature of the instrument to be elaborated, which could take the form of a framework convention of a legally binding character, with the option of treating certain parts of the topic in the form of guidelines or recommendations.

4. The subject of reservations to treaties (A/53/10, chap. IX) seemed to have attracted a growing interest among States: within the Council of Europe, for instance, work was under way to create an observatory of reservations to international treaties. In April 1998, the Afro-Asian Legal

Consultative Committee had held a special meeting devoted to reservations. The Nordic countries noted the growing interest in that topic with great satisfaction. Foreign ministries and international organizations were confronted almost every day with that problem, and an authoritative user's guide produced by the Commission would no doubt be of great practical value. The Nordic countries wished to compliment Mr. Peilet, the Special Rapporteur, for his excellent work, enabling the Commission to adopt some draft guidelines on first reading. The Nordic countries were, however, not convinced that too much work should be devoted to what had been labelled "extensive reservations", as in the proposed guidelines 1.1.5 and 1.1.6, neither of which had been adopted by the Commission. Although it was important to undertake a thorough analysis of questions that might arise concerning reservations, going too much into detail in relation to issues which appeared to be of a more theoretical than a practical interest might cause one to lose sight of the desired result, which was a guide to practitioners.

5. The Special Rapporteur had advocated approaching the questions of interpretative declarations and reservations to treaties in parallel. The Nordic countries had an open mind as to that approach: there was a very close link between reservations and such declarations, which might in some case be hidden reservations. It was essential, however, that the work of the Commission and of the Special Rapporteur should provide easily understood guidelines which clarified the differences — and the similarities — between reservations and interpretative declarations. Neither the Commission nor the Sixth Committee had any intention of altering the reservations regime laid down in the Vienna Conventions. The guidelines would merely act to dispel confusion and provide auxiliary definitions to fill in any gaps left open by that regime, as in the case of inadmissible reservations.

6. Reservations carefully lodged could be seen as a sign that the reserving State took treaties seriously. But some reservations were so general that it was impossible to reconcile the scope of the reservations with the object and purpose of the treaty concerned, or to assess the practical impact of the reservation, as happened all too often with human rights treaties. When States had objected to such reservations, they had asked themselves whether the application of the Vienna regime led to a satisfactory result. According to the Vienna regime, the effect of an objection to a reservation was that the provisions to which the reservation related did not apply as between the two States "to the extent of the reservation". Such a result was, of course, acceptable in relation to multilateral treaties where

there was a clear element of reciprocity on the bilateral level. Such characteristics were not so evidently present in human rights or other normative treaties. What the objecting State would like to see in the sphere of human rights treaties was the opposite result, namely, that the reserving State should be regarded as a party to the treaty without the benefit of the reservation. That was the so-called severability doctrine which had been applied in a number of instances by, *inter alia*, the Nordic countries during the past few years. The Special Rapporteur had not completed his third report, but according to the plans he had indicated, the report would also deal with the formulation and withdrawal of reservations, acceptances and objections to reservations. The Nordic countries hoped that that part of the report would reflect the practice they had adopted lately, especially in connection with human rights treaties. The great majority of States parties to human rights treaties preferred to remain silent as to reservations declared by other parties, however troubling they might be. The Nordic countries noted with satisfaction, however, that more States than before showed an interest in that field. Furthermore, some States which had made unspecified reservations had endeavoured to make them more precise, thus facilitating for others the assessment of the practical impact of the reservation.

7. **Mr. Gaa** (Philippines) commended the Commission for its work on international liability for injurious consequences arising out of acts not prohibited by international law, particularly for the foresight it had shown and the judicious approach it had taken on the issue of the prevention of harm. The norms it had identified and formulated on the topic were of the utmost importance. International harm had now become more than just environmental damage. In a world where Governments and whole economies were becoming increasingly dependent on information technology and advances in communication, transboundary harm took on a different character. While transboundary harm occasioned by electronic and digital means might seem to be different, the basic rules of transboundary harm could conceivably be applicable.

8. His delegation did not at the moment have any specific formulations. Related work was already being done in other forums, and even in the Committee, on standardizing global electronic economic transactions. His delegation was confident that with the Committee and the Commission working jointly, it would be possible to anticipate the legal problems and challenges that would arise in an increasingly computerized world.

9. The growing globalization had also intensified transborder movements of individuals and corporations. Even though many misunderstandings between Philippine

nationals and their host countries were often solved at a local or consular level, the Commission's work on diplomatic protection was without a doubt more than ever important. For a country like the Philippines whose nationals helped fuel the globalized economy and who continued to live in other countries, diplomatic protection was a high priority. It was an institution of longstanding, the practice in the matter was clear and the derogations few. The Commission had given welcome attention to that issue. Moreover, the identification, comparison and analysis of the different bases of the institution of diplomatic protection reflected the legal expertise and scholarship expected of the Commission. Nevertheless, any significant change in concepts of diplomatic protection, especially the relationship between a State and the national it sought to protect, should be approached with caution. He believed that it was preferable to maintain the existing legal concepts and codify them. A re-examination of State practice would perhaps show that States generally preferred to invoke norms based on classical concepts.

10. There would regrettably be areas where the juridical concept of diplomatic protection as currently formulated might prove inadequate because diplomatic protection required the presence of State actors. Recently, a non-State actor had refused to heed the call of the international community to release the nationals of a certain State and those nationals had eventually been executed. The Philippines was not of the view that the current rules of diplomatic protection should be changed so that a State could deal with a non-State actor, but it hoped that one day the law would prove adequate in preventing similar situations.

11. **Mr. Rao** (Special Rapporteur, International Law Commission), bringing to a close the discussion on international liability for injurious consequences arising out of acts not prohibited by international law, said that as Special Rapporteur, he had to work along the lines indicated by the Commission and the Committee, and thus to conclude the elaboration of draft articles on prevention. He was pleased that most of the members of the Committee approved the work done in that connection. As for the scope of the topic, the Commission had tried to be practical and had therefore initially set aside consideration of certain questions, such as the global commons, that some members would have liked to see dealt with in the draft articles. Moreover, with regard to prevention, only activities involving a risk of causing significant transboundary harm had been considered and not harm that had actually been caused. The question of liability would in any case be dealt with eventually, but it had been a matter of timing. In

response to the comment that the Commission should have dealt with significant risk of causing harm rather than with risk of causing significant harm, he believed that if all harm had been taken into account, the notion of threshold would necessarily have been affected. Furthermore, the Commission could not depart too drastically from the solutions adopted in the Convention on the Law of the Non-Navigational Uses of International Watercourses, and it had had to be realistic.

12. There had been comments on the provisions relating to settlement of disputes, non-discrimination and information to the public. Those provisions came under the progressive development of the law, and that trend was certainly more marked at the regional level. The concept of system was a familiar one in watercourse law, and it was likely that if development activities were conducted within a regionally integrated system, the provisions in question would seem much more acceptable.

13. Comments had also been made on the notion of diligence and on how to determine if due diligence had in fact been exercised. The Commission had chosen what had seemed to it the most reasonable solution, namely, to take account of the nature of the activity conducted and the level of technical development of the State of origin and of the injured State. In any case, the Commission and the Special Rapporteur had noted all comments made by delegations, and would not fail to bear them in mind in working further on the topic.

14. **Mr. Baker** (Israel), referring to unilateral acts of States, said that his delegation doubted the usefulness of trying to divide such acts into the categories of "protest" and "promise". Such an attempt would in fact distract from the central question, which was to determine the boundaries of the legal consequences of unilateral acts. The law of treaties was the most appropriate framework for the creation of international legal norms, and most unilateral acts of States fell within the law of treaties or under a rule of customary international law. Hence, they were not autonomous as unilateral acts.

15. Another major difficulty lay in the virtual impossibility of distinguishing between unilateral acts aimed at creating a normative legal obligation and those which were purely political in nature. His delegation agreed with the Rapporteur's conclusion that the task was so complex that it might lead nowhere. The suggested focus on the "intention" of the performing State as a leading criterion was problematic since that element did not lend itself to objective evaluation.

16. It would, moreover, be inappropriate to use specific formal criteria to characterize a binding legal declaration. Given the impossibility of finding a more scientific definition of a unilateral declaration, one was forced to come back to the three prior conditions proposed by the Rapporteur: the intention of the declaring State, the circumstances in which the declaration had been made and the contents of the declaration. In practice, however, the first and second criteria were often seen as one because the circumstances were usually perceived as the only means of evaluating intention. While recognizing the importance of the principle of good faith in contractual international relations, his delegation did not consider it an adequate basis for determining the binding nature of a declaration. Contrary to what was the case in the law of treaties, reciprocity was not needed in the case of a unilateral declaration, nor was any notification of acceptance of the declaration by other States. His delegation was convinced that any attempt to classify unilateral declarations within strict categories would run counter to the actual practice in the international arena. Any attempt to set strict boundaries would impede political manoeuvring by States, with the inevitable result that practical ways would be found to bypass the restrictions. It was imperative to limit the topic as much as possible and to restrict consideration to the existing international principles of good faith, estoppel and international customs and practice.

17. With regard to the question of nationality in relation to the succession of States, he said that consideration should be given to defining succession, in draft article 2 (a), as "the replacement of one State by another in the responsibility for the administration of territory and its population", rather than "... for the international relations of territory". While supporting the principle of presumption of nationality, as laid down in draft article 4, his delegation felt it important to stress that such presumption was subject to any specific arrangements that might be reached by the parties concerned in order to address the problem of temporary statelessness. In addition, it would be preferable, for the sake of consistency, to harmonize the text of draft articles 10 and 18 and to use the expression "genuine and effective link" in both articles. As for article 11, on unity of a family, the issue did not strictly relate to nationality and should be handled in the context of a human rights forum. Similarly, the concept of habitual residence covered by draft article 13 was not directly related to the issue of nationality. It might be preferable to subject the issue to a more detailed analysis independent of the question of nationality. Lastly, his delegation believed that the question of the nationality of legal persons should also be given separate consideration.

18. With regard to reservations to treaties, dealt with in chapter IX, his delegation wished to reply to the question contained in paragraph 41 as to whether unilateral statements by which a State purported to increase its commitments or its rights in the context of a treaty beyond those stipulated by the treaty itself would or would not be considered as reservations. In his delegation's view, there should be a distinction between unilateral statements designed to extend the obligations of a State party and those designed to increase its rights: in the former case such a commitment did not constitute a reservation, while statements of the latter kind, which sometimes constituted a derogation from a State's commitments and could therefore be regarded as limiting the obligations of their author, could constitute a reservation. For that reason, his delegation agreed with the text of draft guideline 1.1.5 and the first part of draft guideline 1.1.6, the second part of which would gain from further clarification. Lastly, it believed that the question of unilateral statements relating to non-recognition should be given further consideration.

19. **Mr. Akbar** (Pakistan) said that he supported the general approach adopted by the Commission in the study of nationality in relation to the succession of States. It was, however, important that the draft articles should not encourage dual nationality. Nor was his delegation in favour of including the right of option contained in draft article 10. While recognizing the importance of the principle of family unity, his delegation considered that habitual residence ought to be considered the most important criterion in determining nationality. As for the form that the draft articles should take, his delegation believed that they should be adopted as a declaration of the General Assembly.

20. With regard to reservations to treaties, the rules established by the Vienna Conventions were generally accepted and respected. There should be no distinction between treaties: all laid down normative rules, so that establishing a regime specific to human rights treaties would make them less universal. States should therefore retain the possibility of making reservations, so long as they were compatible with the object of the treaty. Care should be taken not to alter fundamentally the relevant provisions of the Vienna Conventions.

21. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, he believed that by describing the harm arising from such acts as "significant" there was a risk of getting bogged down in discussions over the meaning of the word. It would therefore be better to delete it and to consider that it would suffice that "harm" had occurred for the injured State to be entitled to reparation.

22. Lastly, with regard to chapter VII of the report, his delegation believed that only States directly injured by a wrongful act should have the right to react and even then they should have to prove that they had suffered harm.

23. **Mr. Yamada** (Japan) said that the topic of unilateral acts of States, dealt with in chapter VI of the report, was undoubtedly one of the most difficult subjects that the Commission had taken up. The Special Rapporteur proposed to limit his work to strictly unilateral legal acts. His delegation supported that approach, bearing in mind that the purpose of the work was to promote legal stability and ensure the rule of law.

24. With regard to the political acts of States, which the Special Rapporteur proposed to exclude from consideration, it seemed difficult to distinguish such acts clearly from unilateral legal acts. In practice, almost all unilateral declarations made by States could be categorized as political acts, even though some might have legal effects. The Special Rapporteur would therefore have to devise effective criteria to differentiate between them. Noting that he also suggested excluding estoppel and acquiescence, the delegation of Japan believed that at the current stage the Commission should not be too restrictive. According to the Special Rapporteur, one of the two basic elements constituting "strictly unilateral acts" was their autonomy. Certainly the notion was important, but it was doubtful whether a purely autonomous act really existed in State practice. As for the scope of the work, his delegation would, given the inherent difficulty of the topic, prefer to limit it to unilateral acts issued to other States.

25. With regard to chapter VIII, his delegation fully shared the view expressed in paragraph 460 that, as the definition of the topic stood, the issues involved in the second part of the topic were too specific and the practical need for their solution was not evident. His delegation therefore thought that the Commission should not continue the study of the second part of the topic as currently defined. On the other hand, it would have no objection if the Commission considered the nationality of legal persons in international law in general, as a new topic.

26. With regard to chapter IX, his delegation commended the Commission and the Special Rapporteur on the excellent results that they had achieved, in the form of a text of draft guidelines on reservations to treaties, adopted on first reading. The guidelines were useful in supplementing the regime of reservations established by the Vienna Conventions, but it was regrettable that issues such as statements at the time of non-recognition or substitution, which had been raised by the Special Rapporteur, had not

been included. The guidelines should be comprehensive, covering all State practices. Noting that paragraph 41 solicited comments on whether unilateral statements by which a State purported to increase its commitments or its rights in the context of a treaty beyond those stipulated by the treaty itself would or would not be considered as reservations, his delegation believed that at first sight such statements did not seem to constitute reservations, but the answer really depended on their specific formulation. There might be cases where they could be considered as modifying the legal effects of certain provisions. The Commission should examine State practice in that regard and come up with clear guidelines.

27. **Ms. Dascalopoulou-Livada** (Greece), referring to chapter VIII of the report, said that Greece had sent its observations on the text adopted on first reading, following the work undertaken by the Special Rapporteur. The Commission faced a difficult task, since the question was not purely theoretical and had specific implications. It was, however, worth pursuing, albeit within the general context of the succession of States.

28. With regard to State responsibility, the Commission had made great progress, enabling it to indicate where the basic difficulties lay. Her delegation believed that the pace of the work should be increased and high priority accorded to the question, so that the second reading of the text could be proceeded with expeditiously, as provided in the Commission's programme.

29. With regard to the form that the draft articles should take, her delegation favoured an international convention as opposed to a declaration or guidelines. The conventional form was best suited to the nature of the rules on State responsibility. Secondly, the discussions within the Commission basically revolved around the question of whether the notion of State crime could indeed be sustained and whether the distinction between criminal and delictual responsibility should be the one employed. In her delegation's view, the notion of State crime, as expressed in article 19 of the draft text, was fundamental. Together with other notions already entrenched in international law, such as those of collective security and *jus cogens*, the notion of State crime constituted one of the pillars for the creation of an international public order. Furthermore, the notion was firmly rooted in the public conscience as a reality which could not be ignored by the law. It seemed, however, that the use of the term "crime" generated problems deriving from its domestic law connotations, even if a State crime could obviously in no way be compared with crimes under domestic penal law and its consequences were not comparable to those under domestic penal law. If there was

any real danger of confusion, the use of an alternative expression, such as "exceptionally serious wrongful act" could be envisaged. Her delegation, however, preferred the term "crime", since it clearly denoted the gravity of the wrongful act envisaged.

30. As to the term "delict", it lacked a generally accepted significance and, in that sense, its use was perhaps not indispensable. It did, however, provide the necessary contradistinction to "crime" and, were the latter term to be retained, there would be no option but to retain the term "delict" as well. As in the case of State crimes, any connection between State delicts and delicts under domestic law should be excluded and such terms should always be understood within their context.

31. Concerning the relationship between the criminal responsibility of States and other, related concepts, such as obligations *erga omnes* and peremptory norms of international law (*jus cogens*), she said that the latter were much broader notions. "State crimes" were more serious than acts violating rules with a *jus cogens* character. Furthermore, the rules relating to State crimes were not subject to any exception. Violations of *jus cogens*, meanwhile, formed a narrower category than acts contravening obligations *erga omnes*. "State crime" could therefore not be replaced by either of the other two notions.

32. Part Two of the draft articles, on the consequences of an internationally wrongful act, was most complex but failed to live up to her delegation's expectations: the different categories of consequence appearing under different chapters of that Part did not seem well organized, perhaps because they reflected the indecisiveness of Part One. A general reorganization would therefore appear necessary in order to take into account the choices made in Part One. With regard to the content, her delegation attached great importance to chapter IV on international crimes, and in particular to draft article 53, which delineated the obligations of all States when an international crime was committed and which, in her delegation's view, should be strengthened.

33. **Mr. Omotosho** (Nigeria), referring to chapter IV of the report, welcomed the Commission's recommendation of a regime of prevention, which, however, would have to be accompanied by a regime of liability. Even if a transboundary activity was legally permissible, due diligence had to apply; if it did not, liability would arise. His delegation also welcomed the provisions in the draft articles dealing with the question of hazardous wastes and the prevention of marine pollution. The absence of such an instrument in the past had prevented the Nigerian Government from dealing effectively with what was known

as the "Koko toxic waste incident", when radioactive hazardous waste had been dumped in Nigeria. With regard to public information, States should be obliged to provide information to the public regarding the activity and the risk involved and, furthermore, should ascertain the views of the public. That would also help Member States with limited technological capacities to grasp the consequences of the action in their territories. His delegation believed that the draft articles should take the form of a framework convention for adoption in national laws by interested States parties.

34. With regard to diplomatic protection, which was a sovereign prerogative of the State as a subject of international law, his Government was currently giving careful consideration to the recommendations contained in paragraph 108 of the report and would shortly supply the information there required. His delegation considered that diplomatic protection should not be applied discriminately nor used by a stronger State against a weaker State nor invoked as an excuse to interfere in the affairs of a weaker State. As the Working Group had emphasized, the importance of the Calvo doctrine could not be overestimated.

35. With regard to reservations to treaties, his delegation regretted that the Rome Statute of the International Criminal Court foreclosed the use of reservations. Reservations could be used, provided that their use did not totally defeat the intentions of the treaties. The Commission should continue its work in that area. Lastly, with regard to unilateral acts of States, his delegation thanked the Working Group and the Special Rapporteur for their excellent work and said that his Government was giving the Working Group's recommendations careful consideration.

36. **Mr. Choi Seung-hoh** (Republic of Korea), referring to the second part of the topic of nationality in relation to the succession of States, i.e., the question of the nationality of legal persons, said he did not regard as feasible the first option suggested by the Working Group on the question, which consisted of expanding the study of the question of the nationality of legal persons beyond the context of the succession of States to the question of the nationality of legal persons in international law in general. Although it would contribute to clarifying the question of the nationality of legal persons in international law in general, it would present numerous practical difficulties because of the diversity of national laws in relation to the question. The second option suggested by the Working Group, i.e., to limit the scope of the study to the succession of States, also seemed unattractive because of the problem of the diversity of national laws on the subject and also because it seemed difficult to limit the study of that question to State

succession alone. Since the question was not a pressing international law issue, as was shown by the low incidence of legal disputes relating to it in recent cases of State succession, and since it was in any case generally dealt with in the context of private international law rather than that of public international law, he proposed that the Commission should decide not to consider it.

37. With regard to the question of the nationality of natural persons in relation to the succession of States — a question not without interest for his country, which remained divided but aspiring to reunification — he thought that a larger place should be given to questions relating to human rights and that any draft provisions should provide normative indications, so that a State's obligations would be owed directly to individuals on the basis of habitual residence, family unity, social and economic welfare and other humanitarian considerations, since certain human rights were so fundamental that they transcended national boundaries. That having been said, the two propositions, that the predominant vehicle of linkage between individuals and State was nationality and domicile, and that human rights were inherent to human persons and based on the inviolability of human dignity and integrity, were linked and should be kept so.

38. **Mr. Pfirter** (Observer for Switzerland) said that he shared the views expressed by the Special Rapporteur on the notion of unilateral legal acts and on the definition of the topic to be studied. He agreed that unilateral legal acts were manifestations of intention on the part of one or more States with respect to other subjects of international law and were intended to produce legal effects independent of the intervention of another subject of international law. That definition would lead to the exclusion of the following categories: unilateral acts which were not legal acts because they were not intended to produce legal effects, i.e., rights or obligations for their authors, such as so-called political acts and acts which were only the vehicle for other acts, which themselves constituted unilateral legal acts, such as notification; legal actions, i.e., the conduct of States, which might be lawful or unlawful and, in the latter case, generated international responsibility, but were not intended to establish general or individual rules; legal acts — offer, acceptance, signature, ratification, the formulation of reservations — which were not really unilateral because the prior or consecutive action of one or more other subjects of international law was necessary for them to produce a legal effect; and legal acts carried out by international organizations because even when they were genuine unilateral legal acts they were special in character and

purpose and thus required special rules, while in any case they did not fall under the Commission's mandate.

39. He also agreed with the reasoning of the Special Rapporteur with regard to estoppel and silence. In the case of estoppel, he shared the Rapporteur's view that it did not constitute a truly unilateral act because it was not specifically intended to create an obligation by the State invoking it and because in any case the characteristic element of estoppel was not the conduct of the State in question but the reliance of another State on that conduct. He also agreed with the Special Rapporteur that a unilateral legal act could be either individual or collective: thus, when two or more States agreed to give up to a third State a territory over which they exercised common sovereignty, the treaty concluded to that effect was a bilateral or multilateral legal act but the promise it contained to the third State with respect to which it had been made was unilateral in nature. That was why he had doubts concerning those conclusions of the Working Group which had been asked to study the problem of unilateral legal acts which differed from those of the Special Rapporteur on estoppel and silence.

40. Responding to the questions raised by the Commission in paragraphs 29 and 30 of its report, he said that with respect to the question of whether the scope of the topic should be limited to declarations or extended to other unilateral expressions of the will of the State, he considered it self-evident that a unilateral legal act existed only to the extent that the State carrying it out had the clear intention of establishing a rule; as such an act usually took the form of a declaration, but perhaps not always, the expression "declaration" seemed unduly restrictive and should be replaced by the term "act". With respect to the question of whether the scope of the topic should be limited to unilateral acts of States issued to other States or whether it should also extend to unilateral acts of States issued to other subjects of international law, he wondered why the scope of the study should be limited to unilateral legal acts issued by States to other States, especially as such acts were often issued both to States and to other subjects of international law, including international organizations.

41. Lastly, he agreed with the Commission's decision not to prejudge the final form — whether convention, guidelines or recommendations — that should be given to the set of articles being prepared on the question of unilateral legal acts, as that would depend entirely on the results of its work.

42. **Mr. Tang Chengyuan** (Secretary-General of the Asian-African Legal Consultative Committee) said that the subjects of chapters I to VI of the report of the International Law Commission (A/53/10) were of immense interest to the

Governments of the African and Asian regions, as well as to the Asian-African Legal Consultative Committee (AALCC). Concerning State responsibility, in particular the difficult and controversial question of countermeasures, he expressed the view that the first countermeasure which the injured State could take was not to comply with one or more of its obligations towards the wrongdoing State. Secondly, the injured State should not resort to countermeasures based on its unilateral assessment, as if that assessment were incorrect, it was taking a risk for which it could incur responsibility for a wrongful act. Furthermore, inasmuch as the right of an injured State to resort to countermeasures was circumscribed by the desired outcome, a proper evaluation of the subject was still required. The law relating to countermeasures had also been discussed during the seminar "Extraterritorial Application of National Legislation: Sanctions Imposed against Third Parties", which AALCC had organized in Tehran in January 1998. On that occasion, it had been generally agreed that the rules of prohibited countermeasures formulated by the Commission in its draft articles on State responsibility should be applied in order to determine the legality of countermeasures purportedly effected by the extraterritorial application of municipal legislation. Those rules included the prohibition of injury to third States, the rule of proportionality and the rules relating to prohibited countermeasures incorporated in article 13 of the draft on State responsibility. The participants in the seminar had emphasized that the peaceful settlement of disputes should be the peremptory norm and also highlighted the interplay between countermeasures and non-intervention, as well as between countermeasures and the unilateral imposition of economic sanctions. The need for the Commission to review the formulation of principles concerning countermeasures vis-à-vis sanctions had been similarly highlighted.

43. It had also been generally agreed at the seminar that the validity of any unilateral imposition of economic sanctions through the extraterritorial application of national legislation should be tested against the accepted norms and principles of international law. The principles discussed included those of sovereignty and territorial integrity, sovereign equality, non-intervention, self-determination and freedom of trade, in addition to the right to development and permanent sovereignty over natural resources. AALCC recognized that the extraterritorial application of national legislation was necessary in certain instances and that contemporary international law provided for the extraterritorial application of municipal legislation in such instances as the performance of consular functions or the control of drug trafficking. It therefore sought to define the

general theoretical principles governing the permissible or impermissible exercise of such measures.

44. AALCC had observed that the Commission had yet to find proper direction in furthering its work on the subject of international liability for injurious consequences arising out of acts not prohibited by international law. A view had been expressed that despite the confusing title the substance was very clear. The view had also been expressed that the Commission's work on prevention of transboundary damage should include the issues of liability and compensation. A further view had been that the duties of prevention should be distinguished from those of notification, which entailed duties of consultation and negotiation, and that the consequences of failure to fulfil the duties of prevention should be dealt with under State responsibility.

45. Having considered the Commission's preliminary conclusions on reservations to normative multilateral treaties, AALCC had emphasized the universal acceptability of the Vienna regime and proposed that any ambiguities and gaps could be filled by commentaries based on an empirical study of the behaviour of States and their underlying motives with a view to developing the reservation regime by way of interpretative codification. The question of whether reservations to human rights treaties were different from reservations to other normative treaties had been raised, as had been the question of whether human rights treaties should be classified among those which admitted no reservations. In that regard, it had been pointed out that the human rights covenants predated the 1968 Conference on the Law of Treaties between States and International Organizations or between International Organizations, which had not deemed it necessary to differentiate human rights treaties from other treaties. As AALCC shared that view, it could not agree with the text of paragraph 3 of the preliminary conclusions. On the other hand, having considered the functions and role of the monitoring bodies in appreciating or determining the admissibility of a reservation, AALCC had expressed approval of the Commission's view that the legal force of the findings made by such bodies in the exercise of their functions could not exceed those resulting from the powers given to them. However, the suggestion of providing specific clauses or elaborating protocols to confer competence on the monitoring body to appreciate or determine the admissibility of reservations had met with resistance, the fear being that a strict regime of reservations with a monitoring body at its apex would impair the objective of universality.

46. With regard to the topic of nationality of natural persons in relation to the succession of States, the view had

been expressed that the draft articles were fairly flexible and provided enough options for States to adopt the draft.

47. The subject of diplomatic protection was of interest to the member States of AALCC in that it complemented the Commission's work on the subject of State responsibility, particularly since a view had been expressed that the item should be restricted to internationally wrongful acts. In that regard, the stipulation contained in the Hague Convention of 1930 whereby a State could not accord diplomatic protection to one of its nationals against a State whose nationality that person also possessed was still applicable. Given the increasing trend towards exchange of persons and commerce across States, which encouraged dual or even multiple nationalities, AALCC felt that any departure from the established principle could have unforeseeable consequences. Although, as a matter of principle, a State could espouse claims only on behalf of its nationals, the Commission might wish to consider the case of claims of non-nationals forming a minority in a group of national claimants. The scope of such a study, however, should be restricted and exclude from its purview the question of protection claimed by international organizations on behalf of their agents.

48. The Commission's objective should be to identify the constituent elements and effects of unilateral acts of States, a subject closely linked with that of the extraterritorial application of national laws. It should also formulate rules generally applicable to such acts.

49. Lastly, the International Criminal Court should be an independent, impartial and efficient judicial institution based on the principles of complementarity, State sovereignty and non-intervention in the internal affairs of States. In addition, the Statute of the Court should be such as to win wide acceptance by States so that it could be established as a universal institution.

The meeting rose at 5 25 p.m.